82-1128

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

**IVAN PAVKOVIC, Director, Illinois Department of Mental Health and Developmental Disabilities,**

*Petitioner,*

vs.

**ROBERT TIDWELL, et al.,**

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Is standing to sue in federal court conferred under Article III of the Constitution to named plaintiffs and class representatives who fail to show that they personally have been injured by the Petitioner's conduct and rely instead upon injury to unnamed class members and to the existence of a "single system" to which named and unnamed class members are mutually subject?

2. Does use of DMH Form 623 constitute an unlawful assignment of Title II Social Security Disability Benefits in contravention of either 42 U.S.C. §407 or this Court's ruling in *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973)?

3. Does the "Equal Access to Justice Act" apply to cases pending on appeal on its effective date?

4. Should the award of attorneys' fees under 42 U.S.C. §1988 be calculated by either an allocation of a portion of the fee award to culpable federal co-defendants under the "Equal Access to Justice Act" or by proportioning the §1988 award to accurately reflect the extent to which the Respondents prevailed on the merits of those claims which were directed against the Petitioner only?

## PARTIES TO THE PROCEEDINGS

Two cases were filed in the District Court for the Northern District of Illinois and were consolidated by order of court on March 25, 1974: *Tidwell, et al. v. Department of Mental Health of the State of Illinois, et al.*, 73 C 3014; and *Schreckenberg, et al. v. Weinberger, et al.*, 74 C 183.

The named plaintiffs and class representatives in the district court and court of appeals were:

> Robert Tidwell, Eulogio Roman, Richard Geisler, Robert Schreckenberg, James Harris and James Sanford.

The defendants in the court of appeals were:

> Richard S. Schweiker, Secretary, United States Department of Health and Human Services; John A. Svahn, Commissioner, Social Security Administration; the Illinois Department of Mental Health and Developmental Disabilities; Ivan Pavkovic, Director, Illinois Department of Mental Health and Developmental Disabilities; and Robert Mackey, Superintendent, Elgin State Mental Hospital.

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STATE

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Ivan Pavkovic, Director of the Illinois Department of Mental Health and Developmental Disabilities, respectfully prays that a Writ of Certiorari issue to review the amended opinion of the United States Court of Appeals for the Seventh Circuit entered in these consolidated proceedings on October 4, 1982.

## OPINIONS BELOW

This matter was first heard and ruled upon in the United States District Court for the Northern District of Illinois by a three-judge panel in an unreported *per curiam* memorandum opinion and order of judgment on June 23, 1976. Appendix A. On April 4, 1977, the United

States Court of Appeals found that it was without jurisdiction to hear an appeal of the *per curiam* ruling prosecuted by the Petitioner. Appendix B.

The three-judge district court panel issued a subsequent unreported opinion and order on March 5, 1979, Appendix C. Thereafter, a single member of the panel ruled on Respondents' entitlement to attorneys' fees under 42 U.S.C. §1988 in an unreported opinion, Appendix D, and entered a final order and judgment, Appendix E.

Petitioner's appeal to the United States Court of Appeals for the Seventh Circuit resulted in the issuance of that court's original opinion of April 30, 1982. On consideration of Petitioner's request for a rehearing, the court of appeals on October 4, 1982 filed its unreported amended opinion which is the subject of the instant petition for a writ of certiorari. Appendix F.

## JURISDICTION

The original opinion of the United States Court of Appeals for the Seventh Circuit was filed and issued on April 30, 1982. Pursuant to an order of court granting a request for an extension of time, a petition for rehearing and suggestion for rehearing in banc was filed by Petitioner on May 24, 1982. On consideration of the petition for rehearing, an amended opinion was filed and issued on October 4, 1982. In light of the amended opinion, the petition for rehearing and suggestion for rehearing in banc was denied. This Petition for a Writ of Certiorari is filed within 90 days of the date of the amended opinion. The Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

### United States Constitution

Article Three:

"**Section 2.** The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies . . ."

### Federal Statutes Involved

42 U.S.C. §405(j):

"**Direct or indirect certification.** (j) When it appears to the Secretary that the Interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person."

42 U.S.C. §407:

"**Assignment.** The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

### Federal Regulations

20 C.F.R. §§404.1601 *et seq.* (1970):

"**§404.1601 Payments on behalf of an individual.**

When it appears to the Administration that the interest of a beneficiary entitled to a payment under title II of the Act would be served thereby, certification of payment

may be made by the Administration, regardless of the legal competency or incompetency of the beneficiary entitled thereto, either for direct payment to such beneficiary, or for his use and benefit to a relative or some other person as the 'representative payee' of the beneficiary. When it appears that an individual who is receiving benefit payments may be incapable of managing such payments in his own interest, the Administration shall, if such individual is age 18 or over and has not been adjudged legally incompetent, continue payments to such individual pending a determination as to his capacity to manage benefit payments and the selection of a representative payee."

**"§404.1602 Submission of evidence by representative payee.**

Before any amount shall be certified for payment to any relative or other person as representative payee for and on behalf of a beneficiary, such relative or other person shall submit to the Administration such evidence as it may require of his relationship to, or his responsibility for the care of, the beneficiary on whose behalf payment is to be made, or of his authority to receive such payment. The Administration may, at any time thereafter, require evidence of the continued existence of such relationship, responsibility or authority. If any such relative or other person fails to submit the required evidence within a reasonable period of time after it is requested, no further payments shall be certified to him on behalf of the beneficiary unless for good cause shown, the default of such relative or other person is excused by the Administration, and the required evidence is thereafter submitted."

**"§404.1603 Responsibility of representative payee.**

A relative or other person to whom certification of payment is made on behalf of a beneficiary as representative payee shall, subject to review by the Administration and to such requirements as it may from time to time prescribe, apply the payments certified to him on behalf of a beneficiary only for the use and benefit of such bene-

ficiary in the manner and for the purposes determined by him to be in the beneficiary's best interest."

**"§404.1604 Use of benefits for current maintenance.**

Payments certified to a relative or other person on behalf of a beneficiary shall be considered as having been applied for the use and benefit of the beneficiary when they are used for the beneficiary's current maintenance—i.e., to replace current income lost because of the disability, retirement, or death of the insured individual. Where a beneficiary is receiving care in an institution (see § 404.1606), current maintenance shall include the customary charges made by the institution to individuals it provides with care and services like those it provides the beneficiary and charges made for current and foreseeable needs of the beneficiary which are not met by the institution."

* * * *

**"§404.1606 Use of benefits for beneficiary in institution.**

Where a beneficiary is confined in a Federal, State or private institution because of mental or physical incapacity, the relative or other person to whom payments are certified on behalf of the beneficiary shall give highest priority to expenditure of the payments for the current maintenance needs of the beneficiary, including the customary charges made by the institution (see § 404.1604) in providing care and maintenance. It is considered in the best interests of the beneficiary for the relative or other person to whom payments are certified on the beneficiary's behalf to allocate expenditure of the payments so certified in a manner which will facilitate the beneficiary's earliest possible rehabilitation or release from the institution or which otherwise will help him live as normal a life as practicable in the institutional environment."

**State Statutes**

*Ill. Rev. Stat.*, ch. 91½, §12-12 (1973):

"**12-12. Treatment charges.** Each patient receiving treatment in a mental health program of the Department, and the estate of such patient, is liable for the payment of sums representing charges for treatment of such patient at a rate to be determined by the Department in accordance with this Section. If such patient is unable to pay or if the estate of such patient is insufficient, the responsible relatives are severally liable for the payment of such sums, or for the balance due in case less than the amount prescribed under this Act has been paid.

* * * *

No admission or hospitalization of a patient in a state hospital may be limited or conditioned in any manner by the financial status or ability to pay of the patient, the estate of the patient, or any responsible relative of the patient.

* * * *

Upon request of the Department, the State's Attorney of the county in which a responsible relative or a patient who is liable under this Act for payment of sums representing treatment charges resides, shall institute appropriate legal action against any such responsible relative, or the patient, or within the time provided by law shall file a claim against the estate of such patient who fails or refuses to pay those charges.

* * * *

In case any patient, the estate of any patient, or the responsible relatives of such patient are unable to pay the treatment charges for the patient provided for by this Act, then the cost of treatment of such patient shall be borne by the State, . . ."

* * * *

**State Rules And Regulations**

Department of Mental Health, State of Illinois,
Rule 10.02 (1973):

**"Rule 10.02—Handling of Patient's Personal Property Other Than Clothing**

When a patient is admitted to a Department facility, cash, traveler's checks, U.S. government securities; etc., in his possession shall be deposited in his trust fund. A trust fund receipt listing all items received shall be made. The original receipt is to be retained in the business office; one copy is to be given to the person depositing the funds, and another copy to the ward supervisor. All funds subsequently received at the facility for the patient's benefit shall be deposited in his trust fund account.

* * * *

Competent patients with trust funds shall be asked to sign form DMH-623, Authorization to Release Trust Funds. The Bureau of Accounting, Reimbursement Services or the facility Patient Resource Unit shall be notified immediately of any refusal to sign form DMH-623. If the patient does not sign form DMH-623, no funds from his trust fund made payable to him may be used to defray treatment charges without a Court Order. Competent patients whose funds are payable to themselves shall be billed for treatment charges and collection shall proceed as provided by law and Department procedures."

* * * *

## STATEMENT OF THE CASE

The issues in this case arise from the intersection of two separate systems (one state, the other federal) for the handling of Federal Old-Age, Survivors and Disability Insurance Benefits (Title II, Social Security Act of 1935, §202, 42 U.S.C. §402 *et seq.*) paid to individuals who are confined in state mental institutions in Illinois.

### The State System

Illinois law provides that patients receiving treatment in a mental health program administered by the Illinois Department of Mental Health and Developmental Disabilities (currently referred to as "DMHDD" but formerly called the Illinois Department of Mental Health, "DMH") are liable for the payment of sums representing charges for such treatment. *Ill. Rev. Stat.*, ch. 91½, §12-12. At the time these proceedings were instituted when a patient was admitted to a State facility, DMH made an inquiry to the Social Security Administration ("Administration") regarding whether the patient was eligible to receive Title II disability benefits. The Administration responded to this inquiry by informing DMH whether the patient was eligible for benefits, and, if so, what kind of benefits and whether the patient was currently receiving such benefits. If such benefits were currently being paid to a "representative payee" (explained *infra*), DMH would take no further action.

If the patient was eligible for social security benefits but had not yet received them, then the State hospital might be requested by the Administration to inform it of the patient's capability to manage his own benefits by filling out Social Security Form 787 and forwarding it to

the Administration. This form contained a clinical evaluation which had to be signed by a licensed physician evaluating the patient's capability to manage his own benefits. If this report indicated that the patient was not capable of managing his own benefits, then a further investigation was begun by the Administration to ascertain whether the patient or some other person (*i.e.* a "representative payee") should be the payee.

**The Representative Payee System**

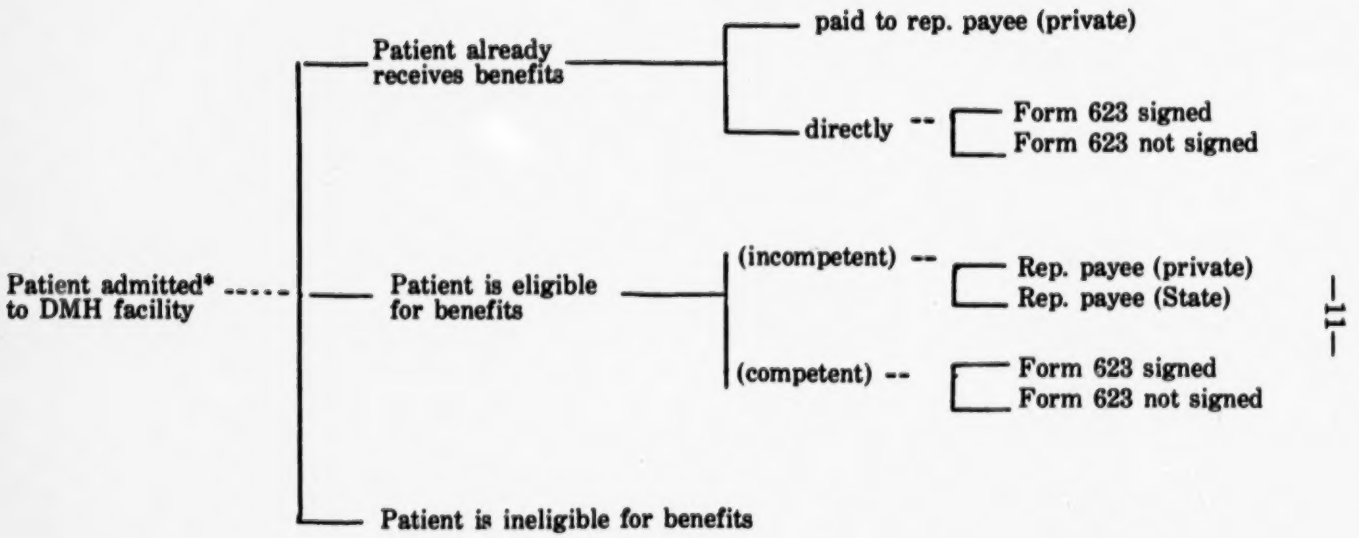
This system was established by federal laws and regulations. *See*, Title 42 U.S.C. §405(j) and the rules and regulations issued thereunder, 20 C.F.R. §§404.1601-1610. Under the Representative Payee System, the Administration was empowered to appoint a person to receive disability benefits on behalf of a beneficiary under certain circumstances. At the time of this suit, a superintendent of a public (state) institution could only be appointed as a representative payee if the Administration determined that the beneficiary was incapable of managing his benefit payments (20 C.F.R. §404.1601), the institution was responsible for the care of the beneficiary (20 C.F.R. §404.1602), and the Social Security Administration could find no other willing or capable person to receive benefits on behalf of that beneficiary. The District Office of the Administration had sole discretion in appointing representative payees.

**DMH Form 623**

On the other hand, where a patient in a State facility was *competent* upon admission, that patient was asked to sign DMH Form 623 (Appendix G). *See*, DMH Rule 10.02. If a patient refused to sign this form, he was billed for his treatment and the hospital followed the collection procedures set forth in *Ill. Rev. Stat.*, ch. 91½, §12-12. If

the patient did sign the form, he agreed that his benefits could be used to pay hospital charges for his current care and maintenance. When this suit was filed, this form explained that the hospital was authorized by law to make charges for the cost of the patient's care and treatment and indicated that the patient consented to endorse any payments he received while in the hospital for deposit in his Trust Fund Account. This form also indicated that the patient consented to have the hospital debit his account for charges made for care and treatment. No such debits were made, however, without later express authorization by the patient. A patient's Trust account, pursuant to DMH rules, was allowed to build up a $400 reserve from which no care and treatment charges could be paid. Subsequently, such patients were asked to expressly authorize payment of hospital charges out of this account by signing a trust fund withdrawal form when payment was to be made (whether or not they had signed Form 623). Each patient was also allowed a minimum of $25 per month for personal needs while in the hospital.

A review of both of these systems reveals the following possibilities upon the admission of a patient to a State hospital:




* *Compare*: Figure 1 in the Court of Appeal's opinion, App. F, at F-3.

**The Proceedings Below**

The *Tidwell* Second Amended and *Schreckenberg* First Amended complaints are class action, civil rights suits brought under 42 U.S.C. §1983 alleging the seizure of Respondents' Title II disability benefits in violation of 42 U.S.C. §407 and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and the due process clause of the Fifth Amendment to the Constitution of the United States. Federal jurisdiction is asserted to lie under 28 U.S.C. §§1331, 1343(3), 1334(4) and 1361.

Prior to June of 1973, Respondents were involuntary mental patients at Chicago Reed Hospital, an institution under the jurisdiction of DMH, who were entitled to receive disability benefits pursuant to Title II of the Social Security Act (42 U.S.C. §401 *et seq.*). Respondents were found incapable of managing these benefits by the Administration; however, the Administration found no close relatives who were willing and able to serve as representative payees for them. Accordingly pursuant to 20 C.F.R. §404.1601 *et seq.*, the Administration appointed the superintendent of the mental institution to serve in that capacity. As representative payee, the superintendent deposited Respondents' Title II benefits into a patient trust fund account. DMH Rule 10.02. The trust fund account of each Respondent was allowed, pursuant to DMH rules, to build up a minimum $400.00 reserve. Thereafter, DMH charged the patients' trust fund accounts an amount authorized by state statute to cover the current care and maintenance charges for each Respondent while allowing a minimum of $25.00 for personal needs per month. The imposition of charges for care and maintenance was expressly authorized by federal regulation. *See*, 20 C.F.R. §§404.1604, 404.1606.

**District Court's Decision**

Pursuant to cross motions for summary judgment filed by the parties, the three-judge district court panel decided that the procedures employed by the federal defendants to appoint representative payees violated the Respondents' procedural due process rights under the Fifth Amendment. Memorandum Opinion and Order of Judgment of June 23, 1976, Appendix A at A-12-A-17. The federal defendants' practice of appointing state officials as representative payees when no other capable individual was available was found to be consistent with both constitutional and statutory authority. Appendix A at A-11, A-12. A declaratory judgment was entered on behalf of the Respondents that the Illinois procedures, to the extent that Social Security disability benefits are assigned prior to receipt, conflicted with 42 U.S.C. §407 in violation of the supremacy clause. *Ibid.* at A-9, A-10.

Thereafter, the Federal defendants and Petitioner revised their separate procedures to effect compliance with the district court's ruling. The Petitioner modified DMH Form 623 so that it included a verbatim restatement of 42 U.S.C. §407 and a statement informing patients that the form was neither irrevocable nor a precondition to the receipt of treatment.

On March 5, 1979, the district court held that the revised federal regulations and procedures satisfied the deficiencies outlined in the June 23rd Order. Appendix C. Regarding the Petitioner, the court found that the revised DMH Form 623 was no longer an assignment of benefits, and thus, it was consistent with 42 U.S.C. §407. Additionally, the court granted Respondents' request for class certification pursuant to FED.R.CIV.P.23.

Subsequently, Respondents petitioned for an entry of an award of attorneys' fees against the Petitioner and the

Federal defendants. On March 24, 1980, the district court dismissed the Federal defendants from any responsibility for fees or costs. On February 6, 1981, the court ruled that the Petitioner would be responsible for all of the fees which were awarded. Appendix D. Additionally, the court awarded a lodestar multiplier of 1.5 to the hourly rates of all attorneys and paralegals, increasing the fee award to $102,232.34. On March 25, 1981 final judgment was entered and Petitioner appealed. Appendix E.

**The Appeal**

On appeal, the Court of Appeals for the Seventh Circuit in its amended opinion, Appendix F, found that Respondents had standing to challenge the legality of DMH Form 623 even though no Respondent upon admission to a State facility had been required to sign DMH Form 623. App. F, at F-5, F-6. The Court of Appeals found that upon admission to a DMH facility "every patient was threatened by the Form 623 procedures . . . the entire system resulted in the deprivation of the Social Security benefits of every patient . . . [and] that named and unnamed [plaintiffs] alike were subject to but a single system which caused all of them the same injury." *Ibid.* These findings persuaded the court that the standing rulings of this court in the recent cases of *Blum v. Yaretsky*, ..... U.S. ....., 102 S.Ct. 2777 (1982) and *General Telephone Co. v. Falcon*, ..... U.S. ....., 102 S.Ct. 2364 (1982) were not controlling. Appendix F, at F-7, F-8.

The appellate court rejected Petitioner's argument respecting the lawfulness of DMH Form 623 procedures as based upon a "restrictive definition of assignment based on Illinois law", Appendix F, F-9, and upheld the district court's ruling that DMH Form 623 constituted an impermissible assignment of benefits under 42 U.S.C. §407. In so doing, the court distinguished *Moore v.*

*Colautti*, 483 F. Supp. 357 (E.D. Pa. 1979), *aff'd*, 633 F.2d 210 (3d Cir. 1980); *French v. Director, Michigan Dept. of Social Services*, 92 Mich. App. 701, 285 N.W. 2d 427 (1979); and *Tunnicliffe v. Commonwealth of Pennsylvania Dept. of Public Welfare*, 483 Pa. 275, 396 A.2d 1168 (1978). Appendix F, at F-10, F-11.

On the issue of attorneys' fees under 42 U.S.C. §1988, the court approved of the actions of the district court in assessing against the Petitioner, without apportionment or reduction, substantially all the time spent by Respondents' counsel litigating the validity of the Federal Representative Payee system. The district court was found not to have committed reversible error by making a finding of a civil conspiracy between the Petitioner and the Federal defendants to buttress its unapportioned fee award. The Court of Appeals however agreed with Petitioner that the application of the 1.5 multiplier was unjustified and reversed this aspect of the ruling below.

The appellate court failed to address Petitioner's contention that the provisions of the "Equal Access to Justice Act", Pub.L. 96-481, §201-08, 94 Stat. 2325 (1980) (amending 28 U.S.C. §2412), respecting federal liability for attorneys' fees, became applicable to the pending controversy on October 1, 1981 and required an apportionment of the fee award based upon the culpability of the Federal defendants.

## REASONS FOR GRANTING THE WRIT

### I.

### DMH FORM 623 PROCEDURES DID NOT GIVE RISE TO AN ARTICLE III "CASE OR CONTROVERSY."

The jurisdiction of the federal courts is limited by the case or controversy requirement of Article III of the Constitution of the United States. Unless a party demonstrates a "personal stake in the outcome," *Baker v. Carr*, 369 U.S. 186, 204 (1962), the dispute may not be adjudicated by the federal courts.

As the Seventh Circuit noted in its opinion, "[i]f a patient entering an Illinois institution was determined to be competent, the patient was asked to sign DMH Form 623." On the other hand, "[i]f a patient was determined to be incompetent, a representative payee was appointed to receive the patient's disability benefits." (Appendix F at F-2, F-3). It is axiomatic that no single patient could have been simultaneously subjected to both DMH Form 623 and the representative payee system, since one cannot be both competent and incompetent at the same time. None of the Respondents was found to be competent upon admission to a State institution; hence, none of them signed DMH Form 623, nor were they asked to do so.

Furthermore, there was no evidence in the record which supported the conclusion that Respondents were under "a real and immediate threat" of harm by the use of Form 623 sufficient to confer standing upon them, *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974), since no evidence was presented that any one of them was likely to be subjected to this form in the immediate future because, although found to be incompetent, they were actually competent and would, therefore, be requested to sign DMH Form

623. Nor was any showing made that any other patients had been subjected to both DMH Form 623 and the representative payee system while confined in a State institution. Thus, the possibility that Respondents would suffer such an injury in the future was completely "imaginary or speculative." *Younger v. Harris*, 401 U.S. 37, 42 (1971). Since Respondents were not harmed or threatened with injury by the use of this form, they lacked standing to contest its legality. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Despite the foregoing, the Seventh Circuit held that Respondents had standing to sue because "every plaintiff was subject to the same system of deprivation, and in the end, every plaintiff suffered the identical harm—deprivation, of Social Security benefits. Only the precise means by which the injury was inflicted were different." (Appendix F, F-6). This is both factually and legally inaccurate. While it is true that every patient at a State institution was subject to either the representative payee system *or* Form 623, this does not create a "single" system applicable to all patients. In fact, there were two mutually exclusive systems, and every patient was subject to one or the other of them.

Assuming, arguendo, that the Seventh Circuit correctly determined that the use of Form 623 was improper because it was an impermissible assignment of Social Security benefits (see Argument II, *infra*, for a discussion of this point), then the conclusion that such individuals were illegally deprived of their benefits logically follows. However, the conclusion that the named plaintiffs suffered precisely the same injury is a *non sequiter* because the district court held that it was not *per se* illegal to appoint the State superintendent to serve as a representative payee. (Appendix A at A-12). Thus, the creation of a trust fund account to hold those benefits would only have been improper if the

Respondents were competent and should have been receiving their own benefits, a fact not yet established. It is quite possible, and just as reasonable, to assume that were hearings held regarding the competency of each of the Respondents, each will again be found incompetent and the State superintendent will be once again appointed as the representative payee. Thus, all Respondents were not subjected to the same system, nor did they necessarily suffer the same injury.[1]

A mere possibility of injury has never been sufficient to confer standing to sue. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). Since the Respondents suffered no actual harm or imminent threat of injury from the use of this form, they lacked standing to contest its validity. The contrary holding of the Seventh Circuit will result in a plethora of actions being filed by individuals who participate in some type of governmental program (e.g., social security, public assistance, etc.) claiming that some portion of that program which they had not yet been subjected to, but which may affect them in the future is illegal. This results in a lack of the "concrete adverseness" which has always been the touchstone of standing principles.

Furthermore, the fact that the Respondents did suffer one type of injury at the hands of the Federal defendants did not operate to give them standing on behalf of others who suffered a different injury attributable to Petitioner. Uninjured plaintiffs cannot bring suit on behalf of an injured class and cannot "represent a class of whom they are not a part," *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962). A class cannot have standing independently of a

[1] The two types of injury suffered were: 1) the use of Form 623 to deprive patients of their social security benefits, and 2) a deprivation of due process in connection with the appointment of a representative payee.

named plaintiff who himself establishes a controversy with the defendant. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976); *Rizzo v. Goode*, 423 U.S. 372-73 (1976); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973). A rule of class standing would confer upon any uninjured person a "roving commission" to seek out violators of federal law and would render the plaintiff's attorney the only real party in interest.

By failing to heed this Court's most recent standing, *Blum v. Yaretsky*, ..... U.S. ....., 102 S.Ct. 2777 (1982),[2] and class representation rulings, *General Telephone Co. v. Falcon*, ..... U.S. ....., 102 S.Ct. 2364, 2370-2372 (1982), the Court of Appeal's decision stands in clear conflict with controlling precedent of this Court and should be reversed.

## II.

## USE OF DMH FORM 623 WAS PROPER UNDER BOTH 42 U.S.C. §407 AND THE DECISION IN *PHILPOTT v. ESSEX COUNTY WELFARE BOARD.*

In essence, the Seventh Circuit has judicially engrafted a "full disclosure" requirement onto 42 U.S.C. §407 in holding that the use of DMH Form 623 constituted a prohibited assignment of benefits. Despite the fact that it was undisputed that Form 623 was revocable at any time, the Seventh Circuit still found that it was an assignment of benefits because the form did not state that it was revocable. This decision ignores all of the relevant Illinois contract law concerning assignments. A review of this law reveals the following:

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[2] "[N]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum v. Yaretsky, supra*, 102 S.Ct. at 2783.

**A. This Form Was Not An Assignment Of Social Security Benefits.**

In Illinois, an assignment operates to transfer to the assignee all of the right, title and interest of the assignor in the assigned property. *Litwin v. Timbercrest Estates, Inc.*, 37 Ill.App.3d 956, 347 N.E.2d 378, 379 (1st Dist. 1976). When a valid assignment is effected, the assignee acquires all of the interest of the assignor in the property which is transferred. *Stavros v. Karkomi*, 39 Ill.App.3d 113, 349 N.E.2d 599, 607 (1st Dist. 1976). In this case, the execution of Form 623 transferred no present ownership interest in the social security benefits of patients to the State because: 1) the benefits were still paid to the patient himself, and the checks had to be endorsed by the patient prior to being deposited in his trust fund account; 2) hospital charges were not automatically paid out of the trust fund account, the patient still had to execute a "withdrawal form" before such charges were paid; and 3) Form 623 was revocable at any time. Clearly, therefore, this form could not have been an assignment of social security benefits because the patient retained complete control over his benefits, even after those benefits were deposited in his trust fund account.

In reality, DMH Form 623 was simply an agreement to pay current care charges out of a particular fund—the patient's trust fund account. It is well settled in Illinois, as in other jurisdictions, that an agreement to pay bills or charges out of a particular fund is not an assignment of such fund or any part thereof. As long as the owner retains any control over the funds, or the power to revoke the agreement, no assignment has been made. *Bell & Howell Co. v. Spoor*, 225 Ill.App. 256, 264 (1922). Here the patients had both control over the funds and the power to revoke the agreement, so no assignment had been made.

Finally, since the State is still using a modified version of this form to do precisely the same thing that was done in the past, the form could not have been an "assignment", otherwise it would still be one. The addition of the disclaimers did nothing to change the nature of the agreement and, therefore, the fact that the court authorized the State to continue to use this agreement is inconsistent with the holding that the agreement constituted an impermissible assignment of benefits.

**B. DMH Use Of Form 623 Was Not Tantamount To Compulsory Legal Process.**

This case is not controlled by the Supreme Court's decision in *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973). In *Philpott* the Supreme Court precluded a state from suing a social security beneficiary to recover from his current benefits for care which the State provided to him in the past. The Court held that as to those services already rendered, the state was a creditor just like any other and 42 U.S.C. §407 barred the action.

However, the Court in *Philpott* did not address the sole issue presented in this case regarding the anti-assignment provision of §407—whether it precludes social security benefits from being used for exactly what they were intended to provide for, *i.e.*, the current care and maintenance costs of the beneficiary. In *Department of Health and Rehabilitative Services, etc. v. Davis*, 616 F.2d 828 (5th Cir. 1980), the Court noted:

> The purpose of social security benefits for the disabled is to provide for their care and maintenance. The purpose of the social security exemption is to protect social security beneficiaries from creditor's claims . . . . this exemption evidences a clear legislative purpose of precluding beneficiaries from diverting their social security payments away from the statute's seminal goal of furnishing financial, medi-

> cal, rehabilitative and other services to needy individuals. 42 U.S.C. §301. Neither the purpose of the benefits, nor the purpose of the exemption, is accomplished by barring Florida from reimbursement. The federal grants are for the purpose of assuring the beneficiary's care and maintenance and the state seeks nothing more than to apply them to the reasonable cost of Glasscock's care. *Id.* at 831.

Even where state welfare departments have induced patients to sign agreements to repay them for current care out of future social security benefits, the validity of such agreements has been sustained as long as the agreements were voluntary. *Moore v. Colautti*, 483 F. Supp. 357 (E.D. Pa. 1979), *aff'd.*, 633 F.2d 210 (3d Cir. 1980); *French v. Director, Michigan Dept. of Social Services*, 92 Mich. App. 701, 285 N.W.2d (1979); *Tunnicliffe v. Comm. of Penn. Dept. of Pub. Welfare*, 483 Pa. 275, 396 A.2d 1168 (1978).

In sum, the use of Form 623 was merely an attempt to utilize the social security benefits for precisely the purpose which Congress intended—the payment of *current* care and maintenance costs. The Court of Appeal's decision is a perversion of that legislative intent and is irrational. When a patient is incompetent and has a representative payee appointed, that payee is obligated—by the provisions of federal law and regulations—to apply the social security benefits to pay for current care costs irrespective of whether the beneficiary is confined in a State institution. On the other hand, where the patient is competent and his own beneficiary, then the court has ruled that his benefits must be protected from being used for precisely the same thing. This is an anomalous result which must be reversed.

## III.

## A FEE AWARD SHOULD BE MEASURED BY THE EXTENT TO WHICH RESPONDENTS PREVAILED AGAINST PETITIONER ON THE DMH FORM 623 ISSUE ONLY.

There were three issues on the merits litigated in the district court: (1) the constitutionality under the Fifth Amendment of the Federal Representative Payee system; (2) the constitutional and statutory validity for the appointment of state officials as representative payees where no other capable individual is available to perform that function; and (3) the legality of DMH Form 623 under 42 U.S.C. §407.

Respondents prevailed against the Federal defendants on the first issue and against the Petitioner on the third issue but lost on the second issue. The Court of Appeals erred in failing to reduce or proportion the award of attorneys' fees pursuant to 42 U.S.C. §1988 to accurately reflect the extent to which Respondents prevailed on the merits of their claims against Petitioner. *Hensley v. Eckerhart*, ..... U.S. ....., 102 S.Ct. 1610 (No. 81-1244, *cert. granted*, March 1, 1982).

The appellate court's affirmance of the "finding" of a conspiracy between Petitioner and the Federal defendants is totally without support in the record below. While the court asserts that "this case was disposed of by the three-judge panel on summary judgment and no findings of fact are required by Fed.R.Civ.P. 56", App. F at F-12, n.10, the order of June 23, 1976 expressly states that the seventeen page memorandum opinion "constitutes this court's findings of facts", App. A at A-17, and as such, that opinion is devoid of any suggestion of a conspiracy.

But for Seventh Circuit's misreading of the record respecting a conspiracy on the representative payee-due process issue, Respondents have, at most, prevailed on only one issue against Petitioner. Accordingly, the fee award should be reversed as unreasonable due to the failure of the trial court to correctly proportion the award to accurately reflect the limited victory which Respondents achieved against Petitioner.

## IV.

## FEDERAL DEFENDANTS ARE LIABLE FOR ATTORNEYS' FEES UNDER THE "EQUAL ACCESS TO JUSTICE ACT", PUB. L. 96-481.

While this appeal was pending, the provisions of the "Equal Access to Justice Act", Pub. L. 96-481, §201-08, 94 Stat. 2325 (1980) (amending 28 U.S.C. §2412), respecting federal liability for attorneys' fees, became effective on October 1, 1981. The Act is applicable to this litigation, *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), *United States v. Citizens State Bank*, 668 F.2d 444, 446 (8th Cir. 1982), *Watch v. Harris*, 535 F.Supp. 9, 14 (D. Conn. 1981), and was cited by Petitioner to the Court of Appeals. The Federal defendants submitted a brief to the Seventh Circuit on the applicability of the new statute. The Court of Appeals however failed to address this issue in either its original or amended opinion. The Court's refusal to address the Federal defendants' liability for fees is fundamentally unfair and violative of Pub. L. 96-481. Fees, if justified at all, should be apportioned among the defendants based on their respective culpability.

## CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that a Writ of Certiorari issue to review the amended opinion and judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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# APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT TIDWELL, EULOGIO ROMAN, JAMES HARRIS, JAMES SANFORD, ROBERT SCHRECKENBERG and RICHARD GEISLER, similarly situated,

*Plaintiffs,*

Nos. 73-C-3014 and 74-C-183 *v.*

CASPAR WEINBERGER, Secretary of the United States Department of Health, Education and Welfare, individually and in his official capacity, JAMES B. CARDWELL, Administrator of the Social Security Administration, individually and in his official capacity, ARTHUR E. HESS, Acting Commissioner of the Social Security Administration, individually and in his official capacity, and LE ROY P. LEVITT, Director of the Illinois Department of Mental Health, individually and in his official capacity,

*Defendants.*

## MEMORANDUM OPINION AND ORDER OF JUDGMENT

(Filed June 25, 1976)

Before SPRECHER, *Circuit Judge*, PARSONS and DILLIN,* *District Judges.*

* Honorable S. Hugh Dillin, United States District Judge for the Southern District of Indiana, is sitting by designation.

PER CURIAM. These cases raise questions concerning state and federal procedures in relation to the distribution and use of Social Security disability benefits for individuals confined to state mental institutions in Illinois. A three-judge panel has been convened pursuant to 28 U.S.C. §§ 2281, 2282. Plaintiffs seek declaratory and injunctive relief against both the state and federal defendants. The issues have been presented to us on cross-motions for partial summary judgment.

I

All of the named plaintiffs are and have been eligible to receive Social Security disability benefits. In addition, both cases involve individuals who are or were at one time confined in state mental institutions. At least some of the named plaintiffs, were subject to Illinois' procedure for obtaining permission in advance for the use of disability benefits payable to the patient, for the payment of charges of the institutions to which they were confined, allegedly in violation of 42 U.S.C. § 407. In addition, at least some of the plaintiffs at some point while confined in the state institution had their benefits paid directly to the superintendent of their institution pursuant to Social Security representative payee procedures and allegedly in violation of 42 U.S.C. §§ 405(j), 407 and procedural due process requirements.[1]

[1] Since it becomes relevant for the determination of precisely what relief is appropriate, we describe the situation of the named plaintiffs in more detail. The named plaintiffs are Robert Tidwell, Eulogio Roman, Robert Schreckenberg, James Harris, James Sanford and Richard Geisler.

Tidwell was a voluntary patient at the Chicago Read Mental Health Center from April 1973 to June 1973. While at the institution payments of his Social Security benefits were paid to the superintendent of the institution.

Roman was entitled to benefits as of September 1972 and they were made payable to the Chicago Read Mental Health Center as of that date.

(Footnote continued on following page)

The defendants include the Secretary of H.E.W., the Administrator of the Social Security Administration, and the Director of the Illinois Department of Mental Health.

A

Pursuant to ILL. REV. STAT. ch. 91½, § 12-12, Illinois charges state institution patients for treatment and other costs in accordance with their ability to pay. In accordance with this policy the Department of Mental Health has adopted Rule 10.02, which provides that a trust fund shall be established for each patient to hold his cash, checks, government securities and the like. Additionally, Rule 10.02 provides that "[c]ompetent patients with trust funds shall be asked to sign Form DMH-623, Authorization to Release Trust Funds."

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[1] *continued*

Schreckenberg was a voluntary patient at the Elgin State Hospital from April 1964 to April 1975. While there benefits were paid to the superintendent of the institution. Plaintiff is now a patient of "Waukegan Chateau" a halfway house in Chicago and payments are made directly to him.

Harris has been a voluntary patient at the Elgin State Hospital since March 1972. From August 1972 to January 1974 disability insurance benefits were paid to the superintendent of the institution as representative payee.

Sanford was a patient at the Elgin State Hospital from 1958 to December 1973 and for approximately four months in 1974. In 1973 and 1974 disability insurance benefits were paid to the superintendent as representative payee. He is presently a resident patient as the Grassmere Halfway House in Chicago and his brother William is presently serving as representative payee.

Richard Geisler was from May 1971 to May 1973 a patient at the Chicago Read Mental Health Center and the Chester Maximum Security Hospital. While a patient at these institutions, social security disability benefits were paid to the respective institutions as representative payee. Upon his discharge plaintiff's father was named representative payee and presently payments are made directly to the plaintiff.

Form 623 authorizes the superintendent to charge the patient's account for treatment charges, clothing, maintenance, commissary purchases and other personal expenses. The patient agrees to endorse any check received for deposit in his account. The agreement covers Social Security disability benefit checks. No patient is required to sign the form, and if he does not no funds may be used to defray treatment charges without a court order. Form 623 does not on its face state that a patient is not required to sign the form or that his consent is revocable at any time. Finally, it does not state that the agreement covers Social Security disability benefits which would otherwise not be subject to legal attachment. Plaintiffs challenge this procedure as violative of the provisions of 42 U.S.C. § 407 prohibiting assignment of future Social Security disability benefits.

B

Another way in which Social Security disability benefits of state mental institution patients are used to pay institution charges is through the designation of the superintendent of the institution as representative payee for the patient. The plaintiffs challenge this practice and the procedure by which it is implemented.

42 U.S.C. § 405(j) provides that when the interest of a beneficiary would be served thereby certification of payment may be made to a relative or some other person.

The procedures for the appointment of a representative payee are implemented pursuant to 20 C.F.R. § 404.1601 *et seq.* The Social Security Administration subscribes to the basic concept that it is generally in the interest of an adult beneficiary to make direct payments. Representative payment is made only upon a finding and determination that due to physical or mental incapacity, the beneficiary's best interest would be served thereby. In the case of institutionalized beneficiaries the procedures for representative payee are usually initiated by an application from the institution.

Incapacity is evidenced by commitment to an institution, a declaration of legal incompetence, injudicious use of funds, and other indications of inability to handle funds, although none of these criteria are conclusive. In addition, medical evidence of incapacity is provided by institution medical personnel through the use of a standard Social Security form. On rare occasions Social Security personnel will question the medical evidence and arrange for a direct interview with the beneficiary. The findings of "field personnel" are sent to a "claims authorizer" for review and for determination that representative payment is or is not required. At the time these lawsuits were filed only the applicant for representative payee status was notified that the decision that representative payment was required had been made, although at the present time a legally competent beneficiary will be notified of that decision. The decision that representative payment is required is an initial determination for which a panoply of administrative and judicial review rights are provided. 20 C.F.R. § 404.905.[2]

The second determination to be made by the Social Security Administration is who should serve as representative payee for an institutionalized and incapable beneficiary. This selection is usually made contemporaneously with the determination that representative payment is required. The representative payee must be qualified to protect the beneficiary's interest, must supply evidence to this effect, 20 C.F.R. § 404.1602, is respon-

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[2] If the beneficiary contests the determination that representative payment is necessary, he is entitled to a reconsideration of that decision. 20 C.F.R. § 404.907-916. If upon reconsideration, the beneficiary is not satisfied with the decision, he is entitled to a trial-type hearing before an administrative law judge. 20 C.F.R. § 404.917-921. This hearing affords the beneficiary the right to personally appear, to confront and cross examine witnesses, and to present any evidence on his behalf. The decision of the administrative law judge is reviewable by the appeals council, 20 C.F.R. §§ 404.940, 404.948-950, whose decision is reviewable by an appropriate federal district court. 42 U.S.C. § 405(g).

sible for using such funds to provide for the beneficiary's current maintenance, 20 C.F.R. § 404.1604, which if the beneficiary is institutionalized includes charges for care and treatment. 20 C.F.R. § 404.1606. The selection process takes into account the stated policy that the payee have an ongoing relationship with the beneficiary. Accordingly, priority is given selection of a family member, guardian, or friend. Institutions, public or private, supposedly are chosen to serve as payee only when there are no other persons available to serve in that capacity.

The designation of an institution superintendent as payee is not in all cases dependent on whether other individuals are available, as some degree of discretion is exercised by the administrator in his decision.[3] At the present time the designation of a representative payee is not an initial determination, is committed to agency discretion, and is exempted from the hearing process and judicial review. Proposed regulations would make this an initial determination and provide notice and hearing rights for all except legal incompetents. Even the proposed procedures would not provide a hearing prior to the designation of an institution superintendent as payee.

Plaintiffs contend that the designation of state mental institution personnel as representative payee violates the policy of 42 U.S.C. §§ 405(j) and 407. Alternatively, they contend that the procedures outlined violate procedural due process.

## II

Jurisdiction in these cases is alleged to be based on 28 U.S.C. §§ 1361, 1331, 1343(3) and 1343(4). At the outset we are met with a challenge to the jurisdiction of this court.

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[3] A change from an individual representative payee to an institutional payee will occur if the payee dies, becomes incapable of managing the benefit payments, no longer wishes to serve as payee, fails to use the funds properly or is not otherwise suitable to act as representative payee.

28 U.S.C. § 1361 grants jurisdiction for "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The federal defendants argue that a decision to make payments to a representative payee and the selection of the payee are decisions committed to the discretion of the Social Security Administration. Without challenging that proposition it is clear that the plaintiffs in these cases are not seeking review of any particular administrative decision, but rather, are seeking injunctive and declaratory relief with respect to whether as a matter of law, state mental institution personnel may serve as representative payees and whether the procedures leading up to such a designation are consistent with procedural due process requirements. These are not questions left to the discretion of administrative officials. Jurisdiction as to the federal defendants in properly invoked under 28 U.S.C. § 1361.[4] *Frost v. Weinberger*, 515 F.2d 57, 61-62 (2d Cir.

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[4] The federal defendants argue that the recent Supreme Court case of *Weinberger v. Salfi*, 95 S. Ct. 2457 (1975), is dispositive of this case and forecloses a finding of jurisdiction. We note at the outset that *Salfi* involved the interpretation of a particular statute (42 U.S.C. § 405(h)) which on its face precluded district courts from exercising jurisdiction over suits to recover benefits under Title II of the Social Security Act based on section 41 of Title 28, 1940 edition (now sections 1331 to 1348, 1350 to 1357, 1359, 1397, 1399, 2361, 2401 and 2402 of Title 28). The action in these cases is premised on 28 U.S.C. § 1361 which had not been enacted at the time 42 U.S.C. § 405(h) was passed. Although there is language in *Salfi* which might be read as precluding all jurisdiction with respect to Social Security benefits other than jurisdiction based on 42 U.S.C. § 405(g) we do not read it so broadly. This is especially so where in these cases the plaintiffs do not attack any particular administrative decisions, but attack certain policies and procedures employed by the Social Security Administration. These cases are unlike *Salfi* in that some of the matters which plaintiffs challenge, particularly the selection of an institution superintendent as representative payee, were not initial determinations and therefore could not have been considered by

(Footnote continued on following page)

1975); *Martinez v. Richardson*, 472 F.2d 1121, 1125-26 (10th Cir. 1973); *Mattern v. Weinberger*, 519 F.2d 150, 155-57 (3d Cir. 1975), *vacated sub nom. Mathews v. Mattern*, 44 U.S.L.W. 3663 (May 24, 1976) (vacated for consideration in light of *Mathews v. Eldridge*); *Elliot v. Richardson*, 371 F. Supp. 960, 967-68 (D. Hawaii 1974) *vacated sub nom. Mathews v. Elliott*, 44 U.S.L.W. 3663 (May 24, 1976) (vacated for consideration in light of *Mathews v. Eldridge*). *But see Jamieson v. Weinberger*, 379 F. Supp. 28 (E.D. Pa. 1974); *Dawson v. Weinberger*, skip op. No. 72-C-146-R (W.D. Va. 1973), *aff'd* 409 F.2d 1407 (4th Cir.), *cert. denied*, 419 U.S. 854 (1974).

Jurisdiction over the state defendants with respect to the use of Department of Mental Health Form 623 is proper under 28 U.S.C. § 1343(3).[5]

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[4] *continued*

judicial review of an administrative decision pursuant to 42 U.S.C. § 405(g). The availability of such review under § 405(g) for the matters in *Salfi* was considered a decisive factor by the majority in *Salfi*. *Salfi*, *supra* at 2465. *See Johnson v. Robison*, 415 U.S. 361, 373-74 (1974). Furthermore, as noted in *Mathews v. Eldridge*, 44 U.S.L.W. 4224, 4227 (Feb. 24, 1976) "§ 405(h) precludes federal question jurisdiction in an action challenging denial of claimed benefits." This action is not challenging denial of benefits, but is challenging procedures engaged in by the Social Security Administration. Moreover, the exhaustion requirement of § 405(g) (noted in *Mathews v. Eldridge*) cannot in any way be met, as no procedures presently exist which the plaintiffs can exhaust.

As an alternate ground of jurisdiction, we note that section 10 of the Administrative Procedure Act, 5 U.S.C. § 701-706, provides an independent jurisdictional basis and that such jurisdiction is not barred by § 405(h). *Sanders v. Weinberger*, 522 F.2d 1167 (7th Cir. 1975), *cert. granted sub nom. Mathews v. Sanders*, 44 U.S.L.W. 3682 (June 1, 1976).

[5] The plaintiffs allege a denial of due process and equal protection with regard to the challenged procedures. Although we decide the issues raised on supremacy clause grounds, we do not consider plaintiffs' claims insubstantial and therefore jurisdiction is proper under section 1343(f). *Hagans v. Lavine*, 415 U.S. 528 (1974).

## III

Pursuant to Illinois procedures and Department of Mental Health Form 623 described in Part I, *supra*, state mental institutions are able to obtain Social Security disability benefits payable to the patients and use these to offset charges of such institutions.

42 U.S.C. § 407 provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

The state defendant argues initially that this section is inapplicable to his procedures. He argues that since he is using the funds for the very purpose for which they are given to the plaintiffs (support and maintenance of the patient),[6] that the legislative rationale behind section 407, that is to prevent the use of these funds for other purposes, is being fulfilled.

We believe that *Philpott v. Welfare Board*, 409 U.S. 413 (1973), forecloses this argument. Defendant attempts to

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[6] 20 C.F.R. § 404.1606 provides:

> Where a beneficiary is confined in a Federal, State or private institution because of mental or physical incapacity, the relative or other person to whom payments are certified on behalf of the beneficiary shall give highest priority to expenditure of the payments for the current maintenance needs of the beneficiary, including the customary charges made by the institution (see § 404.1604) in providing care and maintenance. It is considered in the best interests of the beneficiary for the relative or other person to whom payments are certified on the beneficiary's behalf to allocate expenditure of the payments so certified in a manner which will facilitate the beneficiary's earliest possible rehabilitation or release from the institution or which otherwise will help him live as normal a life as practicable in the institutional environment.

distinguish that case on the grounds that the *Philpott* plaintiffs were required to sign the challenged forms in that case prior to receiving assistance. This, however, does not change the fact that where New Jersey in that case sought to be paid back for assistance rendered, the Court stated section 407 "imposes a broad bar against the use of any legal process to reach all Social Security benefits." *Id.* at 417. The fact that the agreement was required to be signed in that case does not detract from the Court's holding that attempts to obtain repayment for assistance rendered through an assignment of interest in funds to be received, violates section 407.

The Illinois defendant next contends that the agreements signed do not constitute an assignment since they can be revoked at any time, are not required to be signed and because the funds are required to be used for the benefit of the patient.

The fact that the patients need not sign the agreement or can revoke their assent at any time does not make this any less an assignment while it is in effect. Similarly, we disagree with the defendant that his form does not constitute an assignment because the form only authorizes the trustee to use funds for the patient's benefit. Clearly, once the form is signed and payments of Social Security funds, which pursuant to section 407 could not otherwise be reached, have been made, the patient has lost his right to control his funds. Even if we were inclined to agree with the Illinois defendant in his attempts to characterize this agreement as something other than an assignment, we would be persuaded otherwise because of the fact that Form 623 does not disclose to the patient that the agreement may be revoked at any time, or that it covers Social Security disability benefit payments for which, but for the agreement, he would be under no legal compulsion to use for payment to the state for institution charges.

Since section 407 makes the right to any future payment of disability benefits non-transferable, we hold that the Illinois form and procedure violates plaintiffs' rights pursuant to that section and that informed consent must be obtained prior to each charge made against a patient's

trust-account if Social Security disability benefits in that account will be affected.

## IV

Plaintiffs contend with respect to the procedures of the federal defendants that 42 U.S.C. §§ 405(j) and 407 taken together preclude the appointment of superintendents of state institutions as representative payees. They argue that section 405(j) requires a representative payee to represent the best interests of the patient[7] and section 407 represents a policy against compelling payment of Social Security benefits to any creditor, and that since the superintendent of an institution will use the funds to pay the patient's institutional charges he will be in the position of a creditor and could not act in the best interest of the patient.

The federal defendants on the other hand contend that the statutory scheme does not preclude the appointment of an institutional superintendent as a representative payee. They argue that when a determination has been made that the patient is incapable of handling his own financial affairs and there exists no other person to act as a responsible payee, that the best interest of the patient requires the appointment of the superintendent as representative payee. In addition, they point out that although section 407 represents a policy decision not to allow creditors, including state institutions, to legally attach plaintiff's Social Security benefits, that section by no means bars the use of such funds to pay for services rendered by the institution. Indeed, the disability benefits for which the plaintiffs are eligible are intended

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[7] 42 U.S.C. § 405(j) provides:

> When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.

to be used for the support and maintenance of the patient, and that even when a non-institutional payee is appointed he is expected to use the funds for the support and maintenance of the patient, notwithstanding the fact that the state would be without power to enforce collection of these funds.[8]

We recognize the inherent conflict of interest in allowing the state superintendent to act as payee especially where if someone else were payee the state would be helpless to recover these funds. We can neither find nor were we directed to any specific congressional provision forbidding the appointment of an institutional superintendent as representative payee. In addition, we cannot say that where a thorough investigation has been conducted and no other payee is suitable that it is *per se* improper and not in the best interest of the patient to designate a state official as payee. The plaintiff's request for declaratory and injunctive relief forbidding the federal defendants from naming state institution superintendents as representative payees for patients pursuant to 42 U.S.C. § 405(j) is denied.

Plaintiffs next contend that the procedures employed by the federal defendants in the selection of an institutional superintendent as representative payee violates procedural due process requirements.

The procedures outlined in Part I, *supra*, do not provide beneficiaries who are institutionalized with an opportunity to challenge the selection of a state official as representative payee prior to that determination. In the past few years there have been numerous cases delineating when and under what circumstances due process requires provision of an administrative hearing or other administrative safeguards prior to the termination or reduction of property rights.

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[8] We note that the failure to use the funds for the support and maintenance of the patient can lead to the appointment of a new representative payee.

The plaintiffs rely on a line of cases beginning with *Goldberg v. Kelly*, 397 U.S. 254 (1970), for the proposition that prior to the selection of the superintendent at the beneficiary's institution as representative payee notice be given and a hearing be held.[9] Defendants on the other hand rely on cases such as *Arnett v. Kennedy*, 416 U.S. 134 (1974), for the proposition that due process does not require a prior hearing in all cases where property rights are involved.[10]

The most relevant decision of the Supreme Court in this line is also the most recent. In *Mathews v. Eldridge*, 44 U.S.L.W. 4224 (Feb. 24, 1976), the Court considered whether an evidentiary hearing was required prior to termination of disability insurance benefits under the Social Security Disability Insurance Program. As it has done in prior cases, it employed a balancing test weighing three factors:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (44 U.S.L.W. at 4229.)

The private interest involved here is much like the private interest involved in *Mathews v. Eldridge*:

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[9] *See also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Wheeler v. Montgomery*, 397 U.S. 280 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

[10] *See also Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Frost v. Weinberger*, 515 F.2d 57 (2d Cir. 1975); *Dawson v. Weinberger*, slip op. No. 72-C-146-R (W.D. Va. 1973), *aff'd* 400 F.2d 1407 (4th Cir.), *cert. denied*, 419 U.S. 854 (1974).

> Since a recipient whose benefits are terminated [or assigned to a representative payee] is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in *Goldberg*, see 397 U.S., at 263-264, the nonprobationary federal employee in *Arnett*, *see* 416 U.S., at 146, and the wage earner in *Sniadach*. See 395 U.S., at 341-342. (44 U.S.L.W. at 4230-31.)

The Court went on to note that only in *Goldberg v. Kelly*, *supra*, had the Court held that due process requires an evidentiary hearing—and that because termination of welfare benefits "may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U.S. at 264 (emphasis in original). The Court in *Eldridge* differentiated disability benefits from welfare benefits in that eligibility for disability benefits is not based on financial need.

Weighing the different factors here from those in *Goldberg* and *Eldridge*, we come out with the conclusion that the private interest present in this case weighs in the balance similar to that in *Eldridge*. On the one hand, the private interest is less because unlike *Eldridge*, the benefits here are not being terminated, but only transferred to the custody of a representative payee. On the other, the interest is greater because, unlike *Eldridge*, the benefits are more certainly the sole source of support for the individuals, as they are institutionalized at state hospitals and have no relatives who can provide alternative support.

As to the second factor—the risk of an erroneous deprivation because of the procedures used, and the probable value, if any, of additional procedural safeguards—the present case differs significantly from *Eldridge*. In Eldridge, the Court found the Administrative procedures used in terminating a beneficiaries disability benefits were "elaborate." These procedures included continuing communication between

the disabled worker and the agency which enables the agency to monitor the worker's health. Whenever the agency's tentative assessment of the beneficiary's health differs from the beneficiary's own assessment, "the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file. He also may respond in writing and submit additional evidence." 44 U.S.L.W. at 4230. Upon such a record, the monitoring agency makes a decision which is then reviewed by an examiner at the Social Security Administration. Thus, in *Eldridge*, the beneficiary receives continuing notice of the status of his claim for benefits, specific notice when termination is threatened including the basis upon which this decision will be made, an opportunity to review his file, and, finally, an opportunity to submit additional evidence.

None of these procedural safeguards are available to beneficiaries in the present case. During the process to determine whether a beneficiary is competent to handle his benefits and, if not, who should be appointed as representative payee, notice is not given, the beneficiary is not informed as to why the decision is being considered, and even if he learns of the pending determination, he cannot get access to his file to examine the documents therein. Clearly he cannot submit materials on his own behalf. Only shortly after filing of this suit did the Social Security Administration even establish procedures whereby the beneficiary is notified that the Administration has decided to appoint a representative payee. Of course, no evidentiary hearing is held prior to the appointment of a representative payee.

As to the need for a hearing, the Court in *Eldridge* noted that since the decision to discontinue benefits would turn in most cases, upon "routine, standard, and unbiased medical reports by physician specialists, . . . the potential value of an evidentiary hearing . . . [would be] substantially less in this context than in *Goldberg*." 44 U.S.L.W. at 4232. The question in *Eldridge* turned on rather routine medical judgments and thus the absence

of a hearing did not deprive the beneficiary of a significant safeguard.

In the decision making process under scrutiny here the question of competency is not susceptible to routine medical judgments and standard scientific tests. As we understand, often the evidence considered at these determinations consists of little more than conclusory statements made by staff physicians at the beneficiary's institution. Without any opportunity to rebut such statements, benefits could be assigned to a representative payee on the most flimsy of allegations. Thus, in this area where judgments can never be standardized, the need for the minimal safeguard of giving the beneficiary opportunity to examine and challenge the evidence is great.

The final factor to be considered is the public interest. The Court in *Eldridge* noted:

> Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed. (44 U.S.L.W. at 4233.)

And it found that the "ultimate additional cost [of prior evidentiary hearings] in terms of money and administrative burden would not be insubstantial." *Id.*

The plaintiffs in this suit ask us to require that evidentiary hearings be held prior to appointment of a representative payee. We note as did the Court in *Eldridge* that the cost of prior evidentiary hearings would not be insubstantial. In weighing the considerations we find that the private interest present here is not as significant as that in *Goldberg* since no one in the present case will be deprived of the means by which to live by the appointment of a representative payee. Thus, although a hearing which allowed the decision maker the opportunity of meeting the beneficiary would provide the greatest safeguard, it is not constitutionally required. The private interest, as we have noted, although not as

great as that in *Goldberg*, is still significant. Furthermore, the administrative procedures in the present case obviously lack any procedural safeguards. The need for these safeguards is greater here than in *Eldridge*, in that the determination here is made on evidence presenting an inherent possibility of unreliability. Weighing these factors in the balance, and taking our cue from the procedures noted in *Eldridge*, we hold that during a determination to appoint a representative payee the beneficiary: must be 1) given notice that such action is under consideration (the notice must contain a summary of evidence supporting such action); 2) provided access to all evidence and materials which will, or might be, used in making the determination; 3) provided with an opportunity to submit materials on his behalf; and 4) if a representative payee is appointed, given notice of such action containing complete information as to the beneficiary's rights to further challenge the decision.[11]

## V

## *ORDER*

(1) The foregoing opinion constitutes this court's findings of fact and conclusions of law.

(2) The court finds that the Illinois procedure of seeking payment for state institutional charges by having legally competent patients assign their rights to future Social Security disability benefits pursuant to ILL. REV. STAT. ch. 91½ § 12-12, and Department of Mental Health Rule 10.02 and Form 623 to be in conflict with the prohibition against such assignments found in 42 U.S.C. § 407.

It is hereby ordered and adjudged that a declaratory judgment be entered on behalf of the named plaintiffs

[11] These procedures are required only in decisions regarding the incapacity of an individual and the appointment of a representative payee in situations where the payee appointed will be a state official. We need not decide whether the procedures need be applied in other situations.

that the herein described Illinois procedures to the extent that Social Security disability benefits are assigned prior to receipt, is in conflict with 42 U.S.C. § 407 and thereby violative of the supremacy clause.

(3) The court finds no constitutional or statutory authority prohibiting the appointment of state officials as representative payees, where no other capable individual is available to perform that function and accordingly plaintiff's request for declaratory and injunctive relief to that effect is denied.

(4) The court finds that the procedures presently employed by the Social Security Administration and the federal defendants named herein to appoint state mental institution superintendents as representative payees pursuant to 42 U.S.C. § 405(j) and regulations promulgated thereunder violate procedural due process rights.

It is hereby ordered and adjudged that with respect to the named plaintiffs a declaratory judgment be entered to the effect that the designation of a state official as representative payee, without following the procedures layed out below, is violative of the patient's procedural due process rights. To comply with due process, the beneficiary must be: 1) given notice that a determination to appoint a representative payee is being considered, containing a summary of evidence supporting such action; 2) provided access to all materials which will, or might be, used in making the determination; 3) provided an opportunity to submit materials on his behalf; and 4) if a representative payee is appointed, given notice of such action containing complete information as to the beneficiary's rights to further challenge the decision.

Dated at Chicago, Illinois this 23rd day of June, 1976.

/s/ Robert A. Sprecher
United States Circuit Judge

/s/ James B. Parsons
United States District Judge

/s/ S. Hugh Dillin
United States District Judge

# APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
(ARGUED FEBRUARY 15, 1977)

April 4, 1977.

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35]

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WILBUR F. PELL, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

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ROBERT TIDWELL, et al., on behalf of themselves and others similarly situated,

*Plaintiffs-Appellees,*

No. 76-1853 and
No. 76-1854 (consolidated)

*v.*

LE ROY P. LEVITT, Director of the Illinois Department of Mental Health, individually and in his official capacity, and THE DEPARTMENT OF MENTAL HEALTH OF THE STATE OF ILLINOIS,

*Defendants-Appellants.*

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(Caption Continued on Following Page)

ROBERT SCHRECKENBERG, et al., individually and on behalf of all others similarly situated,

*Plaintiffs-Appellees,*

*v.*

LE ROY P. LEVITT, Director of the Illinois Department of Mental Health, and ROBERT MACKEY, Superintendent of Elgin State Hospital,

*Defendants-Appellants.*

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Appeal from a Three-Judge United States District Court for the Northern District of Illinois, Eastern Division.

No. 73-C-3014, No. 74-C-183

Robert A. Sprecher, James B. Parsons, S. Hugh Dillin Judges Presiding.

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## ORDER

In these consolidated cases plaintiffs challenged certain practices of the Illinois Department of Mental Health, the United States Department of Health, Education and Welfare, and the Social Security Administration. Declaratory and injunctive relief was sought on behalf of all current or former patients in Illinois state mental hospitals whose Social Security benefits had been "seized" pursuant to federal and state administrative practices.

A three-judge district court was convened and, on cross motions for summary judgment, that court entered a declaratory judgment holding that the federal procedures used to appoint representative payees violated the due process clause, and that the Illinois procedures used to seek payment for institutional care conflicted with the Social Security Act. No class certification was made. After the district court issued its opinion, the federal defendants filed a motion under Rule 59(e), Fed. R. Civ. P., to alter or amend the judgment, and the state defendants filed a notice of appeal. The state's appeal

raised the single issue of whether the execution of Department of Mental Health Form 623 operated as an assignment of future Social Security disability payments, in conflict with 42 U.S.C. § 407, and therefore violated the supremacy clause.

Prior to oral argument this court ordered the parties to submit supplemental briefs regarding its jurisdiction over the state's appeal from the order of the three-judge district court. The briefs satisfied us on this point, but at oral argument it came to our attention for the first time that (1) jurisdiction might be lacking because of the pendency of the federal defendants' Rule 59(e) motion, and (2) that, even if jurisdiction existed, plaintiffs' standing to raise the claim against the Illinois defendants which was the subject of this appeal was questionable because none of them had executed the challenged Form 623. Accordingly, we requested the parties to file another set of supplemental briefs, addressed to the issues of plaintiffs' standing to sue with respect to the claim involved in this appeal and our own jurisdiction. Those briefs have now been submitted, and we have ordered the record supplemented with an affidavit regarding plaintiffs' standing to sue and a copy of the federal defendants' Rule 59(e) motion.

After examining these supplementary materials, we conclude that we lack jurisdiction over the appeal. As is apparent from Rule 4(a), Fed. R. App. P., the pendency of a Rule 59 motion suspends the finality of the judgment as to all parties. No certification pursuant to Rule 54(b) having been entered, the Illinois defendants may not take their appeal at this time. In view of our holding on the jurisdiction issue, we obviously cannot reach the issue of plaintiffs' standing to sue. That issue may now be resolved by the district court.

APPEAL DISMISSED.

# APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT TIDWELL, et al.,

*Plaintiffs,*

Nos. 73 C 3014
74 C 183

*v.*

JOSEPH CALIFANO, et al.,

*Defendants.*

## MEMORANDUM OPINION AND ORDER

### *PRELIMINARY STATEMENT*

This opinion addresses defendants' motion for this court to alter or amend its Memorandum Opinion and Order of June 23, 1976. In addition, we have before us plaintiffs' motion for class certification.

### *BACKGROUND*

In this case plaintiffs filed suits for declaratory and injunctive relief on behalf of all individuals who had been, or were at that time patients in Illinois state mental hospitals. Plaintiffs alleged that the federal and state defendants' procedure for the distribution and use of Social Security disability benefits violated 42 U.S.C. §407, 1983, and the Fifth and Fourteenth Amendments of the United States Constitution. Plaintiffs' cases were consolidated and plaintiffs subsequently moved for class certification.

On June 23, 1976, we ruled on cross motions for summary judgment, indicating in a declaratory judgment against the federal defendants that procedures employed by them in their appointment of representative payees pursuant to 42 U.S.C. §405(j) and 20 C.F.R. §404.1601-1610 violated due process. We, however, found no constitutional or statutory authority which would prohibit any appointment of representative payees and thus denied plaintiffs' request for injunctive relief against any such appointments by federal defendants.

With respect to the state defendants, we found that the Illinois procedure of having legally competent patients assign their rights to future Social Security disability benefits for payment of institutional charged pursuant to *Ill. Rev. Stat.* ch. 91½ §12-12, and Department of Mental Health Rule 10.02 and Form 623 was in conflict with the prohibition against such assignments found in 42 U.S.C. §407. Accordingly, we entered a declaratory judgment against the use of those procedures to seize Social Security funds. The federal defendants subsequently filed a motion to alter or amend this opinion and order of judgment under F.R.C.P. 59(e).

On July 22, 1976, state defendants filed a notice of appeal with the Seventh Circuit. At that time, however, plaintiffs' motion for class certification and federal defendants' motion to alter or amend were still pending with this court. On April 4, 1977, the Court of Appeals found it was without jurisdiction to hear the appeal since the Rule 59(e) motion to alter or amend suspended the finality of the district court's order absent certification pursuant to Rule 54(b). In accord, the Court of Appeals dismissed the state defendants' appeal pending this court's resolution of plaintiffs' motion for class certification and federal defendants' motion to alter or amend. It is these motions that we now will address.

*MOTION TO ALTER OR AMEND*

I

In our Order of June 23, 1976 (hereinafter Order), we found that the federal defendants' procedures for designation of state institutions as representative payees violated procedural due process on the grounds that, "at the present time the designation of a representative payee is not an initial determination, is committed to agency discretion, and is exempted from the hearing process and judicial review." (Order, p.6). Based on this finding, we ordered the federal defendants to reform their representative payee procedures. To comply with due process, we held that during a determination to appoint a representative payee the beneficiary must be:

(1) given notice that such an action is under consideration, containing a summary of evidence supporting such action;

(2) provided access to all evidence and materials which will, or might be, used in making the determination;

(3) provided with an opportunity to submit materials on his behalf; and

(4) if a representative payee is appointed, given notice of action containing complete information as to the beneficiary's rights to further challenge the decision. (Order, p.17).

The federal defendants contend that the revised regulations presently in effect, comport with the requirements of due process of law by "substantially satisfy[ing] the [O]rder." Specifically federal defendants* argue that the revised regulations make the decision that representative payment is required an initial determination for all legally competent adults, and make the decision regarding the appropriate payee an initial determination for all individuals, including minors and legal

* Unless otherwise indicated the word defendants refers to the federal defendants only.

incompetents, citing Social Security Administration Claims Manual (hereinafter CM) ½T 3011-3019 and 20 C.F.R. §404.905.

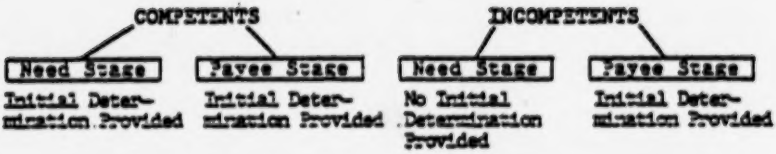
As to legally *competent* adults, the defendants explain that the new regulations require that advance notice be provided prior to the determination that a representative payee be appointed, (the "need determination") and prior to the determination to appoint a specific payee (the "payee determination"). Citing CM T3011 and T3019, defendants indicate that the advance notice provides the competent beneficiary with the opportunity to protest both determinations before they are formalized and to submit additional information. If, however, the beneficiary does not come forward within 10 days to protest, or where his protest is denied, the protest action is processed. If a protest is denied, the beneficiary is sent a formal notice of the determination and provided information regarding his or her right to appeal. (CM T 3011, T 3019, 8470).

Defendants also maintain that the revised regulations change procedures for appointing representative payees for beneficiaries who have been adjudged legally *incompetent.* In these cases, defendant indicates that the panoply of rights afforded under an initial determination apply after the beneficiary has been deemed incompetent but before a representative payee has been appointed—that is, after the need determination but before the payee determination. In other words, the finding of incompetency is subject to agency discretion and nonappealable. The determination regarding who will be appointed representative payee is, however, an initial determination and is therefore subject to full advance notice and post-decision appeals procedure as delineated in 20 C.F.R. §404.905. The notice prior to the payee determination, defendant alleges, affords the legal representative of the beneficiary an opportunity to object to the proposed payee selection and to submit information. The proposed action to name a representative payee is processed if the beneficiary fails to protest within 10 days or if his protest is denied.

Thus, according to the federal defendants, the revised regulations provide competent adult beneficiaries with notice, hearing, and right to appeal at the need stage and at the representative stage. Incompetent beneficiaries including all minors are provided with the initial determination safeguards mentioned above only at the representative stage.

Plaintiffs' basic challenge to defendants' claims is that "Although . . . the new regulations do provide substantial procedural protections on *appeal*, these regulations do not fulfill the Order . . . which requires procedural safeguards be made available to the beneficiary *'during a determination* to appoint a representative payee.'" Specifically, plaintiffs argue that the revised regulations do not provide for notice to the beneficiary of a determination to appoint a representative payee until after that initial determination at the need stage has been reached. Plaintiffs also indicate that because the present regulations provide for a summary of evidence supporting the particular determination only when requested by the beneficiary, the beneficiary may not receive the summary before his hearing. In addition, plaintiffs maintain that their right of access "to all materials which will, or might be, used in making the determination" (citing Order, p. 17), is restricted in that they must request the information per the Privacy Act, 5 U.S.C. §552a and the Social Security Administration Regulations Number 1, 20 C.F.R. 401.1 et seq. instead of being provided the materials by the agency, and that even after the request, certain medical evidence may be deleted. Finally, plaintiffs assert that, although they have the right to submit evidence, present notice forms do not specify the method of submission.

At the outset, it is important to separate carefully plaintiffs' objections. Since initial determinations now are provided for competent beneficiaries at both the need and payee stages, and incompetents at the payee stage, objections addressing the lack of right afforded by an initial determination necessarily refer to the need stage in which the beneficiary may be found incompetent. The situation may be schematized as follows:




Defendants' remaining objections refer to the sufficiency of the procedural rights provided by the initial determination, that is the right to a summary of evidence, the right to access of materials, and the right to submit evidence. Our task, therefore, is to determine whether due process requires an initial determination at the Incompetency Need Stage and whether due process requires more than the "panoply of administrative and judicial review rights" which are provided by the initial determination where it is required.[1]

In our Order we indicated that *Mathews v. Eldridge*, 424 U.S. 319 (1976), addresses the issue of whether procedures prior to and during the selection of a representative payee meet due process standards. In weighing the different factors then under consideration and juxtaposing our findings against the *Eldridge* criteria,[2] we held that "the administrative procedures in

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[1] We described the rights provided by an initial determination in our Order as follows:

> If the beneficiary contests the determination that representative payment is necessary, he is entitled to a reconsideration of that decision. If upon reconsideration, the beneficiary is not satisfied with the decision, he is entitled to a trial-type hearing before an administrative law judge. This hearing affords the beneficiary the right to personally appear, to confront and cross-examine witnesses, and to present any evidence on his behalf. The decision of administrative law judge is reviewable by the appeals council, whose decision is reviewable by an appropriate federal district court. (citation omitted) (Order p.5).

[2] In *Eldridge*, the United States Supreme Court employed a balancing test weighing three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of

(Footnote continued on following page)

the present case obviously lack any procedural safeguards." (Order, p.17). We also found, however, that, although need stage hearings would provide the greatest safeguards, they were not constitutionally required. (Order, p.16).

It was in the context of these findings that we set forth the criteria, heretofore mentioned, that must be followed during a determination to appoint a representative payee. We have examined the revised regulations and now find that they satisfy our criteria and therefore comport with due process requirements.

First, plaintiffs' objection that the new regulations fail to provide for an initial determination at the Incompetency Need Stage is inconsequential since we previously held that such a hearing is not Constitutionally mandated and we reiterate that view here. (Order, p.16). Second, plaintiffs' claim that the beneficiary may not receive a summary of evidence before his hearing is now satisfied since his hearing now may be reviewed by an appropriate appellate body established by 20 C.F.R. 404.905. This is an adequate procedural safeguard. Third, plaintiffs now have access to pertinent materials. The fact that they must proceed under the Privacy Act and the Social Security Administration Regulation 1 to obtain this information, and that certain medical evidence may be deleted from these materials, is not necessarily unfair or unreasonable. Finally, these regulations provide the beneficiary with an opportunity to submit evidence on his own behalf and advise him of the procedures therefor.

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[2] *continued*

such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (424 U.S. at 435).

II

In our Order we found that Department of Mental Health Form 623 provided for an assignment of social security disability funds in violation of 42 U.S.C. §407. We stated:

> "Even if we were inclined to agree with the Illinois defendant in his attempt to characterize this agreement as something other than an assignment, we would be persuaded otherwise because of the fact that Form 623 does not disclose to the patient that the agreement may be revoked at any time, or that it covers Social Security disability benefit payments for which, but for the agreement, he would be under no legal compulsion to use for payment to the state for institution charges."

The deficiencies in Form 623 noted at that time are now remedied. Revised Form 623 now discloses to the patient that the agreement may be revoked at any time and that the execution of the agreement is not a precondition to the receipt of treatment. (State Defendants' Memorandum on the Status of the Case, July 7, 1977, Exhibit B). As now revised the form leaves the patient with sufficient control of his future benefits to be not an assignment nor a transfer but an authorization and a limited trust revocable at will.

*MOTION FOR CLASS CERTIFICATION*

Plaintiffs have moved for class certification pursuant to Rule 23 F.R.C.P. Specifically, they argue that certification is proper since declaratory and injunctive relief is sought against the enforcement of allegedly unconstitutional statutes, citing *Poe v. Menghini*, 339 F. Supp. 986 (D. Kan. 1972) and *Gesicki v. Oswald*, 336 F. Supp. 371 (S.D. N.Y. 1971). In view of our finding that the Social Security's revised regulations comport with due process requirements, the need for injunctive or declaratory relief is obviated, and, except where certification of the class exists as a matter of right, when otherwise it would serve no useful purpose the request for it should be denied.

Plaintiffs however claim that, irrespective of the need for injunctive relief, class certification should be ordered because the proposed class is entitled to monies "seized and applied" by the state defendants prior to the Social Security revisions and damages resulting from it. This claim appears to be based on two theories: an ordinary §1983 theory and a theory based upon the concept of restitution. (Plaintiffs' Second Amended Complaint, filed March 7, 1974.)

The ordinary §1983 damage theory is that defects in the former procedures employed in the selection of a representative payee caused injury to the civil rights of the plaintiffs' class in violation of 42 U.S.C. §1983. For this claim to result in an award there would have to be a showing of some type of actual personal abuse. (*Carey v. Piphus*, 46 U.S.L.W. 4224 (March 21, 1978)). Otherwise, only a nominal recovery would be appropriate. *Ibid.* at 4229. Here plaintiffs do not allege any actual personal injury from the seizure and application of the beneficiaries funds, and, thus, only a nominal recovery could be appropriate. The possibility of dispersement of a mere nominal recovery would not itself justify certification of the class. (*Callahan v. Sanders*, 339 F. Supp. 814, at 819 n. 6 (M.D. Ala. 1971)).

The restitution theory similarly results in a finding that no monies, or at best nominal funds, would be available for distribution. Plaintiffs do not claim that the money in question was acquired or used for any pu. pose other than for the care of the patient. What they urge is that the State would have been obliged to spend the amounts it spent on them had they not been receiving disability benefits or had they received the checks themselves and spent them. In other words, plaintiffs do not claim that the funds were diverted, but that they were used without their consent under circumstances in which plaintiffs were not obligated to use or allow the use of them for their institutional care. There can be no doubt about the fact, however, that funds of a mental patient in a State institution are subject to the use of the state to reimburse it for its care of the patient. Illinois Annotated

Statutes 91½, §12-12 (Supplement 1978) (Smith-Hurd). *Cf. In re Estate of Zagoras*, 11 Ill. App. 3d 355, 296 N.E. 2d 641 (1973). Further, the intent of Congress was to make its Social Security Fund, under proper procedures, available to pay the state for its care of mentally disabled recipients. Federal Social Security Act, 42 U.S.C. §1396 et seq. (Supplement 1978). The state should not be required to disgorge itself of funds used in good faith for the patient even though the procedure may have been in error. The general impact of the Illinois Mental Health Code, and in particular Chapter 91½, Sections 12-10 through 12-12, is that the State should seek reimbursements of amounts spent on patients care, and, that persons acting in good faith in administering the program should be absolved of any liability for their handling of patients and their affairs. Here again, it would seem then that, since no monies would be available for distribution, certification and notification of the class would be useless. It should be pursued only where certification exists as a matter of right.

In view of all the foregoing, we have here a situation in which, considering all several damage claims of the plaintiffs, no funds could be available for distribution to the members of the class being represented by the named plaintiffs.

One final consideration remains. The rule in this circuit is that class certification may not be denied on the ground of lack of "need" where the prerequisites of Rule 23 are met. *Fujishima v. Board of Education*, 460 F.2d 1355, 1360 (7th Cir. 1975); *Vickers v. Trainor*, 546 F.2d 739, 747 (7th Cir. 1976); *Vergara v. Hampton*, No. 77-2102 (7th Cir. Aug. 24, 1978). We find that plaintiffs have met the requirements of Rule 23.[3] Class certification,

[3] Plaintiffs have satisfied the 23(a) prerequisites to class certification. A sufficient number of recipients are involved so to make joinder impracticable. *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 90 (7th Cir. 1941). Plaintiffs allegations concerning the utilization of Form 623 and certain representative payee procedures are common and typical to the purported class.

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therefore, although not necessary, should be made. Certification, however, would not justify notification other than by the posting of the outcome of these proceedings on the bulletin boards of the institutions of the Department of Mental Health of the state for a period of 30 days. *Fujishima, supra* at 1360. And, out of an abundance of caution, such notification should inform those who may be members of the class that the nature of these proceedings will not result in a judgment for money damages sufficient to permit any fund for distribution to the member of the class.

In conclusion, federal defendants' motion to alter or amend should be and the same hereby is granted. And, for the reasons stated, plaintiffs' motion for class certification should be and the same hereby is allowed.

Dated at Chicago, Illinois, this 5th day of March, 1979.

/s/ Robert A. Sprecher
United States Circuit Judge

/s/ James B. Parsons
United States District Judge

/s/ S. Hugh Dillin
United States District Judge

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[3] *continued*

*Swanson v. American Consumer Industries*, 415 F.2d 1326, 1333 (7th Cir. 1969). Finally, there is no indication that the class representatives will be antagonistic to the concerns of the general class membership.

Plaintiffs also are in compliance with 23(b). Specifically, they have established under 23(b)(1) that separate actions by individual recipients would create a risk of inconsistent or varying adjudications and would impede the ability of other members not parties to the adjudication to protect their interests. *See Generally, Technograph Printed Circuits Ltd. v. Methode Electronics*, 285 F. Supp. 714 (N.D. Ill. 1968).

# APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT TIDWELL, et al.,

*Plaintiffs,*

Nos. 73 C 3014
74 C 183

*v.*

JOSEPH CALIFANO, et al.,

*Defendants.*

## MEMORANDUM OPINION AND ORDER

Plaintiffs initially appeared before this court challenging the state and federal procedures employed in the distribution and use of social security benefits for individuals confined to mental institutions in Illinois. In its Memorandum Opinion and Order of June 23, 1976 (Order I), the court held that the federal procedure for appointing a representative payee was a violation of due process of law. However, the court declined to accept plaintiffs' assertion that the practice of appointing an institutional superintendent as representative payee violated any constitutionally or statutorily protected rights of the inmates. The court also ruled that the state's use of the Illinois Department of Health Form 623 amounted to a future assignment of social security benefits in contravention of 42 U.S.C. §407. As a result of the litigation, both the state and federal procedures were modified to comport with the rulings of this court. In a subsequent memorandum opinion of March 5, 1979, we approved the changes made in both procedures.

Pursuant to 42 U.S.C. §1988 plaintiffs now request attorneys' fees for the time and costs spent litigating this matter. The federal defendant is not a party to this action as it was dismissed because the court was without jurisdiction to award fees against the United States. The state defendant is the only party against whom fees may be assessed.

Defendant, in opposition to the payment of fees for plaintiffs' attorneys, first argues that plaintiffs lacked standing to challenge Form 623 because, allegedly, none of them ever signed it. Defendant has misconstrued the issue. Whether plaintiffs signed Form 623 or not, they were members of a class who were unjustly deprived of all or part of their social security benefits due to a conspiracy between the state and federal defendants. Form 623 was one important aspect of that conspiracy.[1] Clearly, plaintiffs had standing, to challenge both state and federal procedures. Further, implicit in the designation of class certification (Order II, March 5, 1979) was a finding of standing.

Defendant next contends that this court is without jurisdiction to award fees because of plaintiffs' delay in requesting attorneys' fees. Specifically, they claim that the order of March 5th, 1979, constituted a final judgment and, therefore, failure to move for attorneys' fees within ten days of that time became a bar to entertaining any motion for fees. (Plaintiffs cite Rule 59(e) of the Federal Rules of Civil Procedure.) Whether the order of this court was a final judgment under Rule 59(e) is irrelevant here. After judgment is rendered in a civil rights case, a petition for fees can be made under §1988 and is not governed by Rule 59(e). *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980) distinguishing *Stacey v. Williams*, 446 F.2d 1366 (5th Cir. 1971).

Defendant argues in the alternative that any award of fees should be substantially reduced because the plaintiffs

[1] A fact not directly addressed by either side is that plaintiffs, patients of a mental institution, may well have lacked the requisite capacity to make a valid execution of Form 623.

did not prevail on all the issues against the state. According to defendant this raises the question of whether the plaintiffs could even be deemed prevailing parties within the language of §1988. The courts have liberally construed this section to permit the allowance of attorneys' fees in this type of litigation as long as there are no special circumstances which would render an award unjust. *Sethy v. Alameda County Water Dist.*, 602 F.2d 894 (9th Cir. 1979, *cert. denied*, 444 U.S. 1046 (1980); *Criterion Club of Albany v. Board of Commissioners of Daugherty County, Georgia*, 594 F.2d 118 (5th Cir. 1979); *Davis v. Murphy*, 587 F.2d 362 (7th Cir. 1978).

To be a prevailing party within the meaning of §1988 a party need not win on all the issues. *Bly v. McLeod*, 605 F.2d 134 (4th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Dawson v. Pastrick*, 600 F.2d 70 (7th Cir. 1979). In the instant case, plaintiffs were successful in two of three issues presented, thus prompting the state and federal governments to make substantial changes in their procedure for the disbursement of social security benefits. Plaintiffs, further, were successful in their endeavors to obtain class certification, thus benefiting the general public. As a result of this action, plaintiffs have brought about needed relief, not just for themselves but, more importantly, for present and future members of the class. Their suit has operated as a catalyst to prompt the defendants to change their procedure in a way which will provide a substantial benefit to patients in the state's institutions. *Fluhr v. Roberts*, 463 F.Supp. 745 (W.D. Ky. 1979). There is no question about the fact that plaintiffs are prevailing parties as that term is used in the fee awarding provisions of §1988.

Defendant, State of Illinois, being successful on one issue was permitted to continue the practice of appointing an institutional superintendent as representative payee for inmates of the institution. The principle question which remains in this regard is whether, based upon the success of defendant on a single issue, a reduction in the attorneys' fees claimed is warranted. The court is of the opinion that a reduction on this basis is not

warranted. The cases hold that under circumstances such as these, the success of the defendant on a collateral issue would not justify a reduction in fees generated by the prevailing party. *Northcross v. Board of Education of Memphis City*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 100 S.Ct. 2999 (1980); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978).

It is true that some courts have advocated a proportionality theory for recovery when a plaintiff does not win on all the issues. *See Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978); *Batiste v. Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974) *cert. denied*, 420 U.S. 928 (1975). However, the court finds that at least two reasons exist for not following such a course in this case. First, the issue on which the state prevailed is not of comparable significance to those issues on which the plaintiffs were successful. Second, full allowance of fees for legal services are properly allowable when a claim of public magnitude is successfully pursued even though some of the same services may also have been rendered in the instance of a second claim in which the party did not prevail. *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978). In the recent case of *Northcross v. Board of Education of Memphis City*, 611 F.2d 624 (6th Cir. 1979), the court, directly addressing this issue, rejected the theory of proportionality. *Id.* at 36.

As was stated earlier in this opinion, the federal defendant has been excused from payment of attorneys' fees, thereby leaving the question of whether the state should be required to pay the full cost of this litigation while its co-conspirator is absolved of paying for its conduct. In addressing such an issue it is wise to examine the purpose of §1988. The section encourages government on both the state and federal levels to hold in high esteem the civil rights of its people. Those of its people who succeed in this purpose are deemed to be advancing the best interests of the general public. *Martin v. Wray*, 473 F.Supp. 1131 (E.D. Wis. 1979). To dilute an award by attempting to pr rate it as the state defendant would have the court do here, would serve to frustrate the purpose of this act. If not assured of adequate compensation,

counsel might be dissuaded from engaging in complex cases involving the civil rights of large groups of persons who otherwise would be unable to afford to pay for adequate representation.

In *Arkansas Community Organizations For Reform Now v. Arkansas State Board of Optometry*, 468 F.Supp. 1254 (E.D. Ark. 1979), a §1988 case, the court held that a losing defendant must bear the full cost for all matters that cannot be clearly attributed to another defendant. Taking into consideration the results reached in this case, and the purpose for which §1988 was enacted, it is inescapable that the state defendant is liable for the full time spent litigating matters pertaining to both defendants. In the instant case however, plaintiffs have voluntarily agreed to reduce their request for fees by an amount which represents all time spent solely on matters involving the federal defendant.[2]

Defendant contends that "special circumstances" exist which would render an award of attorneys' fees improper in this case, citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Defendant maintains that in all respects this suit was settled prior to passage of 42 U.S.C. §1988 except for the motion of the federal defendant to alter the court's first order. However, the state defendant overlooks the fact that their own appeal from that order was pending when §1988 was enacted and that the provision for attorneys' fees would be applicable where an appeal from the civil rights case is pending. *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114 (1st Cir. 1977).

As to defendant's claim that excessive duplication of hours necessitates a reduction in fees, the court agrees. *See, Alsager v. District Court of Polk County Iowa*, 447 F.Supp. 572 (S.D. Iowa 1977). A review of the docket

[2] It should be noted that the majority of time spent in litigating this case was devoted to claims which involved both state and federal defendants and that this time would not have been less had only the state been sued.

sheets, the pleadings and briefs, discloses several instances of duplication. In assessing fees these hours will be taken into consideration.

Defendant next asserts that no award whatsoever should be granted to the Cook County Legal Assistance Foundation because of the nature of the organization. Their proposition is without substance. With regard to a legal association the fee awarded should reflect the market value of the services provided, not the actual cost to the foundation. *Urbina v. Quern*, 482 F.Supp. 1013 (N.D. Ill. 1980); *Lackey v. Bowling*, 476 F.Supp. 1111 (N.D. Ill. 1979). We find fees to be properly recoverable by the legal assistance foundation.

In its final argument the State of Illinois claims that it should not be required to pay attorney's fees to Daniel M. Friedland. The state argues that Mr. Friedland did not make any appearances or author any written document filed in the case. As it was, Mr. Friedland was engaged in the Indiana case of *McBride v. Secretary of the United States*, No. I.P. 73 C 26. Because *McBride* and *Tidwell* raised many of the same issues and, in the interest of judicial economy, the Chief Judge of the Seventh Circuit designated a three-judge district court to serve in both matters. In 1976 the *McBride* case was dismissed in its entirety on grounds of mootness and standing. As mentioned above, Mr. Friedland represented citizens of the State of Indiana in litigation directed against that state. Considering the field of interstate relations, it is reasonable to assert that taxpayers of one state should not be given the responsibility of paying the obligations of citizens of another state. *Cf. Bigelow v. Virginia*, 421 U.S. 809 (1974), and *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). In *Gaines*, the United States Supreme Court made this statement:

> Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal rights must be maintained. That obligation is imposed by the Constitution upon the States severally

> as govenmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system.

350 U.S. at 350.

*In Bigelow*, the Court stated that:

> A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.

*Supra*, at 824-25. Thus *Bigelow* stands for the proposition that no one state has the right to conduct the internal affairs of another. Read in conjunction with *Gaines*, the converse of this maxim becomes a truism: no state may cast its own internal obligations upon the shoulders of a sister state.

The people of Illinois should not be taxed to compensate an attorney from Indiana whose only relationship to the *Tidwell* case was his participation in the *McBride* matter, an Indiana concern, heard by the same panel of judges. Irrespective of the prevailing parties in *McBride*, the State of Illinois was never party to that litigation and should not now be required to subsidize either side. When Mr. Friedland's request for fees is considered in light of all the foregoing, it is clear that it should be denied. Accordingly, Mr. Friedland's petition for attorney's fees is dismissed.

After a careful examination of the record, defendant's allegation of duplication, the need for attorneys, the complexity and novelty of this litigation and numerous other factors, *see generally, Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) the following conclusions regarding fee awards are made:

1. The hourly fees requested by the individual plaintiffs are fair and reasonable based upon an examination of current market rates. *See e.g., Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979); *Corpus v. Estelle*, 605 F.2d 175 (5th Cir. 1979), *cert. denied*, 445 U.S. 919 (1980); *Population Services International v. Carey*, 476 F.Supp. 4 (S.D. N.Y. 1979).

2. The number of hours requested by the plaintiffs for a period of litigation spanning 7 year is not excessive.

3. Fees are properly recoverable for time and costs spent litigating the fee issue. *Weisenberger v. Huecker*, 593 F.2d 49 (6th Cir. 1979) *cert. denied*, 444 U.S. 880 (1979); *Urbina v. Quern*, 482 F.Supp. 1013 (N.D. Ill. 1980).

4. A lodestar multiplier of 1.5 is eminently fair and reasonable to apply to the awards of the law firm of Sachroff, Schrager, Jones, Weaver & Rubenstein Ltd., and the Cook County Legal Assistance Foundation, premised upon the importance of the results achieved in this case. *See, Population Services International v. Carey*, 476 F.Supp. 4 (S.D. N.Y. 1979); *Imprisoned Citizens Union v. Shapp*, 473 F.Supp. 1017 (E.D. Pa. 1979).

It is hereby ordered that the state defendant in this cause is to pay the following amounts to plaintiffs for attorneys' fees, expenses and advances:

1. An amount of $99,644.84 for the firm of Sachnoff, Schrager, Jones, Weaver & Rubenstein. (See Appendix for computations.)

2. An amount of $2587.50 for the Cook County Legal Assistance Foundation. (See Appendix for computations.)

Enter:

/s/ James B. Parsons
United States District Judge

Dated: February 6, 1981

# APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT TIDWELL, et al.,

*Plaintiffs,*

No. 73 C 3014 *v.*

JOSEPH CALIFANO, et al.,

*Defendants.*

## FINAL ORDER AND JUDGMENT

UPON MOTION by the plaintiffs for entry of a final order and judgment in accordance with the Federal Rules of Civil Procedure and in accordance with prior orders of this Court:

IT IS HEREBY ORDERED AS FOLLOWS:

(1) A class is certified of all beneficiaries of social security payments from 1968 to the present while residents in institutions of the Illinois Department of Mental Health and whose social security payments were paid to the State of Illinois as representative payee or through withdrawals of funds of trust accounts authorized by DMH Form 623. All such persons shall be bound by this order.

(2) Because the orders of this Court have applied only to injunctive and declaratory relief under Rule 23 (b) (1) and Rule 23 (b) (2) of the Federal Rules of Civil Procedure and have not certified any class under Rule 23 (b) (3) of the Federal Rules of Civil Procedure, there is no

requirement that notice be sent to individual members of the class and no members of the class will be permitted to opt out of the judgment entered hereby. This order will not affect whatever rights individual plaintiffs may have to seek damages in appropriate state forums. This court makes no judgment on the availability of any such damages.

(3) Attorneys fees are awarded to plaintiffs in accordance with this Court's order of February 6, 1981.

(4) This Order will constitute final judgment and the clerk shall enter it accordingly pursuant to Rule 58.

Dated: March 25, 1981

/s/ James B. Parsons
Chief Judge
United States District Court

# APPENDIX F

## AMENDED OPINION

### IN THE
### UNITED STATES COURT OF APPEALS
### FOR THE SEVENTH CIRCUIT

Nos. 81-1402, 81-1654

ROBERT TIDWELL, et al.,

*Plaintiffs-Appellees,*

*v.*

RICHARD SCHWEIKER, etc., et al.,

*Defendants-Appellees,*

and

IVAN PAVKOVIC, etc.,

*Defendant-Appellant.*

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ROBERT SCHRECKENBERG, et al.,

*Plaintiffs-Appellees,*

*v.*

RICHARD S. SCHWEIKER, etc., et al.,

*Defendants-Appellees,*

and

IVAN PAVKOVIC, etc., et al.,

*Defendants-Appellants.*

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 73-C-3014, 74-C-183—**James B. Parsons**, *Judge.*

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ARGUED DECEMBER 8, 1981—DECIDED OCTOBER 4, 1982*

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* On consideration of the petition for rehearing, this amended opinion has been filed and issued this 4th day of October, 1982. In light of the amended opinion, the petition for rehearing is denied. Also the petition for rehearing *en banc* is denied, no active judge having requested a vote on the suggestion for an *en banc* rehearing in light of the amended opinion.

Before CUMMINGS, *Chief Judge*, SWYGERT, *Senior Circuit Judge*, and CUDAHY, *Circuit Judge*.

SWYGERT, *Senior Circuit Judge*. In 1973 plaintiff-appellee Robert Tidwell, for himself and on behalf of a class similarly situated, filed a complaint against the Director of the Illinois Department of Mental Health ("DMH").[1] An amended complaint was later filed in which Tidwell named the Secretary of the United States Department of Health, Education and Welfare[2] and the Administrator of the Social Security Administration[3] as additional defendants ("federal defendants"). In 1974 plaintiff-appellee Robert Schreckenberg, for himself and on behalf of others similarly situated, filed a suit identical to the Tidwell complaint. The two suits were consolidated pursuant to the state defendant's motion.[4] The plaintiffs challenged the statutory and regulatory scheme providing for the payment of Social Security disability benefits ("Social Security benefits" or "disability benefits") to institutionalized mental patients.

Specifically, plaintiffs alleged that their disability benefits were unlawfully seized by the state and federal defendants in violation of 42 U.S.C. §§ 407 and 1983 and the Fifth and Fourteenth Amendments of the Constitution. The plaintiffs' disability benefits were subject to seizure by one of two methods:

> (1) If a patient entering an Illinois institution was determined to be competent, the patient was asked to sign DMH Form 623. The form allowed the state to accumulate disability benefits and other assets in

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[1] The DMH is now called the, "Department of Mental Health and Developmental Disabilities." Leroy Levitt, the original defendant in this case, has been replaced by Ivan Pavkovic, the present director.

[2] Caspar Weinberger, former Secretary of HEW, has been replaced by Richard Schweiker.

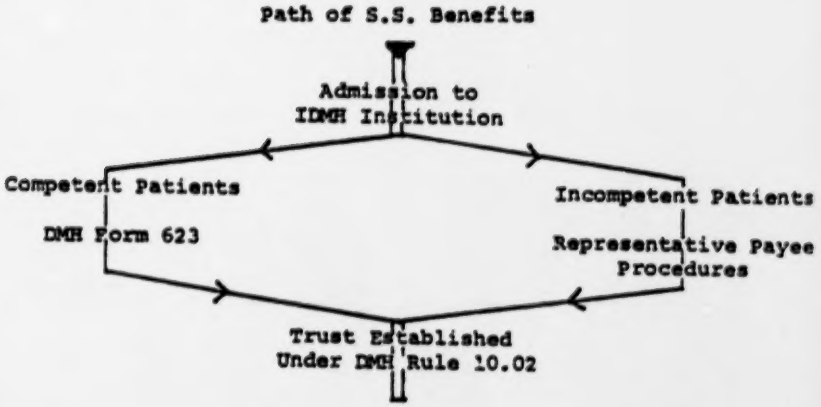
[3] John Svahn is presently the Commissioner of the Social Security Administration.

[4] The Tidwell and the Schreckenberg plaintiffs will be referred to collectively as "Tidwell." Unless otherwise stated, the state defendants will be referred to as "the State."

a trust fund. When the assets in the fund reached $400, the state could use the surplus to pay the support costs incurred by the patient at the institution. DMH Form 623 did not disclose to the patient that the patient would be cared for regardless of whether the form was signed, that the agreement was revocable at any time or that the agreement covered Social Security disability benefits, which were not otherwise subject to legal process. *See* Figure I.

(2) If a patient was determined to be incompetent, a representative payee was appointed to receive the patient's disability benefits. The superintendent of the patient's institution was appointed as the payee if there was no other person available, such as a family member, to serve in that capacity. The process for appointing a representative payee did not provide notice to the patient or an opportunity for the patient to submit evidence. Once a representative payee was appointed, the disability benefits were accumulated in a trust fund identical to that used in conjunction with Form 623. *See* Figure I.

FIGURE I



A three-judge court was impaneled to consider the issues raised by this suit. On June 23, 1976 the court found that the Illinois statutory and regulatory scheme involving the use of DMH Form 623 was in conflict with 42 U.S.C. § 407 and, therefore, violated the supremacy clause of the Constitution. The three-judge court also found that the appointment of an Illinois institutional superintendent as a representative payee was not *per se* unlawful, but that the procedures actually used to appoint such a payee violated due process standards. The court ordered specific remedial steps to cure both violations.

Subsequent to this ruling, both the State and the federal defendants altered their procedures relating to patients' disability benefits. On March 5, 1979 the three-judge court amended its 1976 order and determined that the revised federal procedures for appointing a representative payee now comported with due process. The court also found that revised DMH Form 623 was no longer an assignment in violation of 42 U.S.C. § 407. Additionally, Tidwell's motion for class certification was granted.

After this decision, plaintiffs' attorneys filed motions in the Northern District of Illinois pursuant to 42 U.S.C. § 1988 requesting attorney's fees against both the State and federal defendants. The court concluded that fees could not be awarded against the federal defendants and Tidwell voluntarily reduced fees attributable solely to these defendants. On February 6, 1981, the district court held that the State was responsible for all remaining attorney's fees and applied a 1.5 lodestar multiplier to the hourly rates of all attorneys and paralegals.

The State now appeals from the final judgment of the court on four grounds:

(1) Tidwell did not have standing to challenge the legality of DMH Form 623;

(2) the original Form 623 was not an assignment in violation of 42 U.S.C. § 407;

(3) the district court erred in awarding attorney's fees; and,

(4) the district court erred in failing to apportion attorney's fees between the state and federal defendants and by applying a lodestar multiplier.

Tidwell contends that all the issues raised on appeal by the State are moot except whether the award of attorney's fees was proper. We shall first consider the mootness issue.

I

Tidwell argues that the underlying controversy in this case has been extinguished and further review by this court would be meaningless. Tidwell bases this argument on the fact that the State defendant voluntarily altered DMH Form 623 and the new form has been in effect for more than five years; the challenged activity has ceased and there is no reasonable expectation that the conduct will be repeated.

The record does not show that the State's actions were "voluntary." The DMH altered Form 623 only after the three-judge court declared it illegal and this conduct was in compliance with the judgment of the court. If a party believes an order is incorrect, the remedy is to comply promptly with that order or judgment (absent a stay) and then to appeal. *Maness v. Meyers*, 419 U.S. 449, 458-59 (1979). A party does not lose the right to appeal simply because it complies with an order of the court. Further, in the instant case, there is reason to believe that the conduct complained of may be repeated. In its reply brief, the State reaffirmed its belief that the original Form 623 was legal and, stated that if allowed to do so, it would reinstitute the form's use. Where a reasonable expectation exists that the conduct will be repeated, the issue is not moot. *Johnson v. Board of Education*, 664 F.2d 1069, 1071-72 (7th Cir. 1981). Because we have concluded that none of the issues raised in the State's appeal are moot, we now turn to the merits of those arguments.

II

The State contends that Tidwell lacks standing to challenge Form 623 because neither he nor any of the

other named plaintiffs signed the form or were even asked to sign it. The record in this case, however, discloses that when a patient was admitted to a DMH facility an inquiry was made to determine whether that patient was competent or incompetent. At this point, as the district court expressly found, every patient was threatened by the Form 623 procedures. In addition, whether a patient eventually signed the form (if found competent) or had a representative payee appointed (if found incompetent), the entire system resulted in the deprivation of the Social Security benefits of every patient. These undisputed facts delineated in greater length earlier in this opinion, establish that the plaintiffs in this action, named and unnamed alike, were subject to but a single system which caused all of them the same injury.[5] Standing to challenge this system, in which the State was a knowing and active participant, is not defeated simply because the named plaintiffs did not actually sign Form 623. Every plaintiff was threatened by Form 623 upon entering the facility, every plaintiff was subject to the same system of deprivation, and in the end, every plaintiff suffered the identical harm—deprivation of Social Security benefits. Only the precise means by which the injury was inflicted were different.

The recent Supreme Court case of *Blum v. Yaretsky*, 50 U.S.L.W. 4859 (No. 80-1952) (June 25, 1982), which discusses standing, does not compel a different result. In that case, Medicaid patients in a nursing home brought an action on behalf of themselves and other members of a class to challenge nursing home procedures which allowed the transfer or discharge of such patients without notice or hearing. The named plaintiffs had been transferred to lower levels of care, but they sought to represent other class members who allegedly had been transferred to a higher level of care. The Court held that they lacked standing to challenge transfers to higher levels of care. The Court found that "[n]othing in

[5] *See* Part IV, *infra*, for a discussion of the State's role and culpability in both prongs of the system of deprivation.

the record available to this Court suggests that any of the individual respondents have been either transferred to more intensive care or threatened with such transfers." *Id.* at 4861. The plaintiffs contended that the standing requirements of Article III were nevertheless met because other unnamed class members had been transferred to higher levels of care under the contested procedure, but the Court rejected this contention:

> Respondents . . . "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975). Unless these individuals "can thus demonstrate the requisite case or controversy between themselves *personally* and [defendants], 'none may seek relief on behalf of himself or any other member of the class.' *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)."

*Id.* at 4861 n.13 (emphasis added). The Court then emphasized that a transfer to a lower level of care was very different from a transfer to a higher level, noting that first, patients may refuse transfer to a higher but not lower level of care without jeopardizing Medicaid benefits, and second, transfer to a lower level necessarily results in a reduction in Medicaid benefits while transfer to a higher level means an increase in those benefits.

In the instant case, unlike *Blum*, the injury suffered by all of the class members was the same—deprivation of Social Security benefits. Further, as the district court found, all of the class members upon entering a DMH facility were threatened with the same system of deprivation, which included Form 623. Therefore, applying the analysis of *Blum* to the facts in the case at bar, we conclude that the named plaintiffs have standing under Article III to challenge both Form 623 and the representative payee procedure.

The State also challenges the district court's determination that the claims of the named plaintiffs were

typical of the claims of all members of the class. We conclude that the district court properly found that the requirements of Rule 23 were met in this case. We believe that it was unnecessary for the named plaintiffs actually to have signed Form 623 to be proper representatives for the entire class.

In *General Telephone Co. v. Falcon*, 50 U.S.L.W. 4638 (No. 81-574) (June 15, 1982), the plaintiff as an individual and as a class representative sought to challenge alleged discrimination by the defendant in both hiring and promotion. The Court concluded that the named plaintiff, whose claim charged the defendant with discrimination in promotion, could not under Rule 23 represent other class members who had not been hired. As the Court found, not being hired and not being promoted are quite different injuries. In addition, the Court recognized that there could easily be a tension, especially at the remedial stage, between those class members seeking promotion and those seeking initial employment. In the case at bar, however, there is no such tension since every patient suffered the identical injury (deprivation of Social Security benefits) via a single system of deprivation.

The named plaintiff in a class action must have standing under Article III and be a proper class representative under Rule 23. For the reasons stated, we conclude that *Tidwell* satisfied the requirements for both.

## III

We agree with the three-judge court that the original DMH Form 623 violated 42 U.S.C. § 407. Section 407 provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

The Supreme Court has issued one opinion to date on the scope and purpose of section 407: *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973). Though not directly analogous to the facts of this case, *Philpott* is instructive. In *Philpott* an individual named "Wilkes" applied for assistance from the Essex County, New Jersey, Welfare Board. As a condition for receiving the assistance, the Board required Wilkes to execute a reimbursement agreement. The agreement had the effect of a judgment and allowed the Board to obtain reimbursement out of subsequently discovered or acquired property. Wilkes began receiving assistance from the Board, and soon after he was awarded lump-sum retroactive disability benefits under the Social Security Act. Wilkes declined to repay his interim assistance and the Board sued to reach the bank account in which Wilkes had deposited his benefit check. The Supreme Court held that section 407 on its face prevented the Board from reaching these funds. The Court concluded that the language of section 407 is all inclusive and it "imposes a broad bar against the use of any legal process to reach all Social Security benefits." *Id.* at 417.

Despite the breadth of *Philpott*, the State insists that Form 623 was not an assignment; it was revocable and voluntary, the funds were used for the purpose they were granted for, and the agreement did not manifest a present intent on the part of the mental patient to transfer all his rights or complete control. We are not persuaded by these arguments.[6]

Even though Form 623 was revocable, it still remained a transfer or assignment while it was in effect. Further, we are not convinced that it was voluntary. Nowhere on the face of the form did it state that a patient would be treated regardless of whether he signed the form or that the agreement was revocable. The restrictive definition of assignment based on Illinois law advanced by the State ignores the language and the purpose of section 407. An agreement need not have permanence or transfer complete control of disability benefits before it falls within the ambit of section 407.

[6] *Philpott* forecloses the State's argument that section 407 does not apply when the benefits are used for the purpose for which they were granted.

The State cites three cases which it believes require a reversal of the three-judge court.[7] In these three cases, *Moore*, *French*, and *Tunnicliffe*, the facts are similar. Applicants for Social Security benefits were granted interim assistance by a local welfare department. There was generally a six-month delay between the date the federal benefits were applied for and the date they were received. The first federal payment included a lump-sum payment for benefits retroactive to the application date. The local department required the recipient to sign a loan agreement and an authorization to pay a claim. When the recipient received his Social Security benefits, including his lump-sum retroactive payment, he became obligated to pay back the interim assistance to the local agency. The agreements in all three cases were held valid even though a recipient was required to sign the agreement before receiving interim assistance and even though the agreements did not disclose a person's rights under *Philpott* or section 407.

*Moore*, *French*, and *Tunnicliffe* are distinguishable from the facts in the instant case and we do not believe they support the State's position. The agreements were nothing more than an obligation to pay back a loan and they did not delineate the source of the repayment. The agreements did not subject Social Security benefits to any legal process nor did they transfer control of Social Security benefits to the State. Most importantly, unlike Form 623, these agreements did not result in monthly Social Security checks actually being received and disbursed by the state agency.[8] If a recipient from *Moore*,

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[7] *Moore v. Colautti*, 483 F. Supp. 357 (E.D. Pa. 1979), *aff'd*, 633 F.2d 210 (3d Cir. 1980); *French v. Director, Michigan Dept. of Social Services*, 92 Mich. App. 701 (1979); *Tunnicliffe v. Commonwealth of Pennsylvania Dept. of Public Welfare*, 483 Pa. 275 (1978).

[8] In *Moore*, *supra*, n.12, some of the lump sum Social Security checks were actually received by the state agency, not the recipient of the Social Security benefits. The agency paid itself the money owed by the recipient and then paid the remainder to the recipient. The checks were paid directly to the state agency in accordance with the Interim Assistance

(Footnote continued on following page)

*French*, or *Tunnicliffe* chose not to repay the local agency, the Social Security funds could not be reached. In the instant case, the recipients had no choice of whether to pay the State for the service they received; the state received and cashed their checks. Further, the DMH was obligated to pay its own expenses first when a trust was created pursuant to Form 623, putting the State in the position of a preferred creditor; a position found illegal by the Supreme Court in *Philpott*.

We are convinced that Form 623 is a transfer or an assignment in violation of section 407. Unless a patient in a DMH institution is advised that he will receive treatment regardless of whether he signs Form 623, that Form 623 is revocable, and that the form covers Social Security benefits not subject to legal process, it cannot be said that Form 623 is voluntary or that the patient retains enough control to remove the agreement from the ambit of section 407.

## IV

42 U.S.C. § 1988 gives courts the discretion to award attorney's fees to the prevailing party in civil rights suits. It is clear that Tidwell has prevailed in this litigation. The plaintiffs succeeded on two of their three substantive claims[9] and were instrumental in prompting substantial changes in the procedures for disbursement of disability benefits to mental patients. This broad remedial relief inured to the benefit of all mental patients in Illinois because plaintiffs also succeeded in their motion for class status. For Tidwell to be considered the prevailing party, it was not necessary that he prevail on all three claims. *See Dawson v. Pastrick*, 600 F.2d 70, 78 (7th Cir. 1979); *Parham v. Southwestern Bell*

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[8] *continued*

Reimbursement Program, 42 U.S.C. § 1383(g)(1). Direct payments to state agencies under section 1383(g)(1) do not violate section 407.

[9] The only claim Tidwell did not prevail on was the claim that the appointment of a representative payee was a *per se* violation of the Constitution.

*Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). The record does not disclose any special circumstances which would render the award of fees unjust. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

V

The only remaining issue is whether the amount of the fees awarded was erroneous. The State contends that the award was excessive for several reasons:

(1) The State was held responsible for fees relating to issues involving only the federal defendant;

(2) the fees awarded to the Cook County Legal Assistance Foundation ("CCLAF") are duplicative; and

(3) the use of a 1.5 lodestar multiplier was erroneous.

We reject the State's first two arguments but agree with its third contention.

The State insists that the illegal appointment of a representative payee involved only federal culpability and the State of Illinois should not be held liable for attorney's fees relating solely to this issue. The State's assertion of innocence is directly controverted by the findings of the district court. The court found that a conspiracy existed between the state and federal defendants.[10] To prove the existence of a civil conspiracy, it is not necessary to show an express agreement. All that is required is that the participants share a "general conspiratorial objective." *Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir. 1979). In the instant case, the illegal diversion of Social Security benefits from the plaintiffs

[10] The State argues that a finding of conspiracy was never made by the three-judge court. A single district court judge first identified the existence of a conspiracy in his order awarding attorney's fees. It was not necessary for the three-judge court to have made the finding of conspiracy. This case was disposed of by the three-judge panel on summary judgment and no findings of fact are required by Fed.R.Civ.P. 56.

to the state defendant was the common conspiratorial objective.

Relying on *Arnold v. IBM*, 637 F.2d 1350 (9th Cir. 1981), the State next argues that the conduct of the DMH was not the proximate cause of Tidwell's injuries: the appointment of a representative payee is not illegal *per se* and the only illegal aspect of the procedure was solely within the control of the federal defendants.[11] Not only is *Arnold* factually distinguishable from the instant case,[12] it was not necessary for the state defendant to have had control over the illegal procedures when the DMH willingly participated in and benefited from the procedures. *Arnold* requires only that the defendant "personally participated in a deprivation of the plaintiff's rights." 637 F.2d at 1355. The DMH's participation in a conspiracy is clearly established by the record. The appointment of a DMH superintendent as a representative payee was usually initiated by the state institution. The institution was required to fill out a five-page application and submit evidence indicating that the institution was responsible for the patient's care. Each time a DMH institution superintendent applied to become a representative payee, the DMH set in motion a series of acts where the reasonable outcome was a con-

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[11] The State of Illinois did have some control over the appointment of a representative payee. This is demonstrated by the fact that the State amended Ill. Rev. Stat. ch. 91½ § 2-105 (1979) to require informed consent before a service provider (DMH superintendent) can be appointed a representative payee.

[12] In *Arnold v. IBM*, *supra*, the Ninth Circuit held that no causation was proven where IBM created a task force which violated plaintiff's constitutional rights. Although IBM was the "but for" cause of plaintiff's injuries, the court found that IBM did not have sufficient control over the task force to be held responsible for its actions. The instant case is distinguishable because the DMH set in motion a series of acts when the DMH knew or should have known that a constitutional injury was the only reasonable outcome. In *Arnold* a constitutional violation was not a reasonable outcome of establishing the task force.

stitutional injury. *See Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). The representative payee procedures involved both federal and state liability and it was well within the district court's discretion to assess attorney fees against the state on this important issue.

In arguing that the attorney's fees awarded to CCLAF are duplicative, the State maintains that both sets of attorneys billed for briefs on the same issue and both sets of attorneys billed for the same court appearance. The State, however, has overlooked the procedural posture of this case. As stated above, this suit involved two sets of plaintiffs: the Tidwell plaintiffs and the Schreckenberg plaintiffs. In accordance with a stipulation, an attorney for the Tidwell plaintiffs was designated lead counsel for the consolidated cases. Almost all the hours billed by CCLAF were for work done prior to the certification of the class; the two groups of plaintiffs were still separate and distinct up to this point. The only work performed by CCLAF after the class certification related to the petition for attorney's fees.[13] We do not believe that the district court overlooked any duplication of efforts.

Having examined all of the factors for determining the appropriateness of a fee award as outlined in *Waters v. Wisconsin Steel Workers of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997, we believe that it was an abuse of discretion to attach a 1.5 multiplier to the attorney's fees awarded in this case. The district court premised the multiplier on the importance of the results achieved by Tidwell's attorneys. We agree with the district court that the results achieved are important, but we do not think that this

[13] The State points out that CCLAF billed for an appearance not corroborated by the docket. In plaintiffs' motion for attorney's fees, reference was erroneously made to a court appearance on January 8, 1980. The correct date was December 27, 1979. This typographical error is no reason to deny or limit the award of fees and the error would have been corrected in the district court if defendants had raised the issue below.

factor alone justifies the use of the multiplier.[14] The quality of the attorney's services was reflected in the hourly rates and the facts of this case are relatively simple. This suit was indeed novel when filed but not so different or unique as to warrant a multiplier. The other factors outlined in *Waters* were not important enough to be mentioned by the district court and we agree that these factors were insignificant.

The district court's order is affirmed in part and reversed in part. The cause is remanded to that court to recompute the attorney's fees in accordance with this opinion.[15]

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

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[14] It is possible that results alone might justify a multiplier but this is not the case here.

[15] The only aspect of the fee award that the State agrees with is the denial of fees to appellant M. Daniel Friedland. The district court held that it would be unjust to tax the State of Illinois for Friedland's fees because Friedland represented an Indiana plaintiff and his case was directed at Indiana officials. Friedland may well have had some connection with the attorneys for the Illinois plaintiffs, but we cannot say the court abused its discretion by denying fees to him.

# APPENDIX G

DMH-623
Rev. 1-69

STATE OF ILLINOIS
DEPARTMENT OF MENTAL HEALTH

I, _____ (Patient's Name), a patient at _____ (Institution Name), do hereby state that I have been fully informed and I am aware that the Department of Mental Health is authorized to make determinations of the charges for my treatment and to charge me or my estate at the prevailing maximum rate for patients; and, if I am unable to pay, that my responsible relatives may be requested to pay an amount chargeable under the statutes of the Department.

I hereby consent to the deposit in the _____ (Institution Name) Trust Fund to my account all monies received by me at the hospital during my stay at _____ (Institution Name). To that end, I hereby agree to endorse any checks received by me so that they can be deposited in my trust fund account. I understand that these funds will be disbursed by the Superintendent on my behalf for my maintenance, treatment charges, clothing, commissary purchases and other personal incidental purchases for my self as long as

I am a patient at _____, and I hereby consent to such disbursements. I understand that any balance remaining in my account will be returned to me upon my discharge from _____, after all outstanding charges have been determined and paid in accordance with the rules and regulations of the Department of Mental Health.

(Institution Name)

(Institution Name)

_____

Dated _____

Witness: _____

Dated: _____